No. 2[illegible]

FIRST NATIONAL BANK OF [illegible],

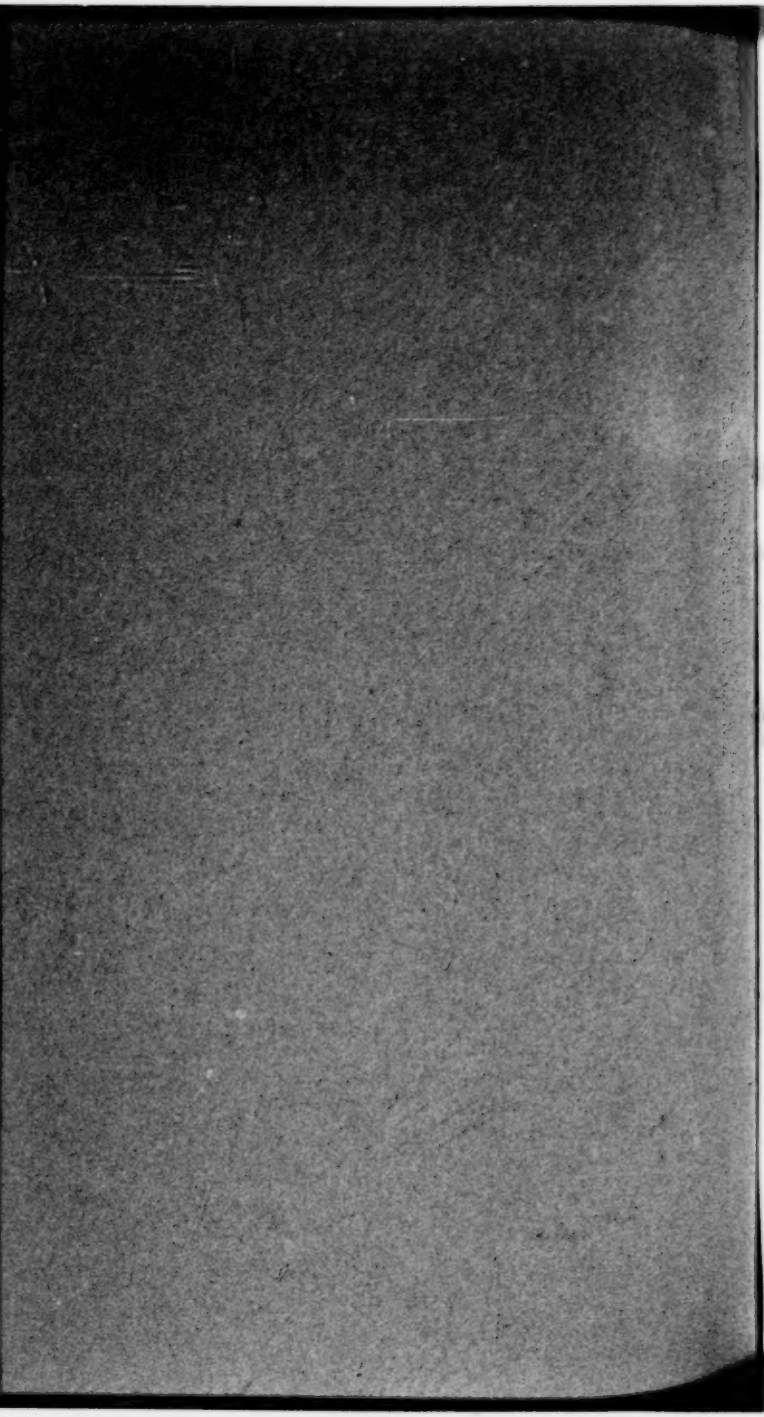
vs.

LOUISIANA TAX COMMISSION, ET AL.

BRIEF ON BEHALF OF DEFENDANTS.

G. L. POSTERIE,
ROBERT J. O'[illegible],
AUBREY H. P[illegible],
H. C. WALKER, JR.,
LEON D'QUIN,
ELIAS GOLDSTEIN,
Attorneys for Defendants.

Montgomery-Anders Printing Co., Inc., [illegible] Orleans, La.



INDEX.

	Pages
ent of the Case	1-7
ion Supplementing Brief Heretofore Filed in Support of otion to Dismiss Appeal	7-12
ent	12-141
B-INDEX OF ARGUMENT:	
Section 5219 U. S. R. S.	13
Summary of Plaintiffs' Complaint	14
Section 4, Article 10, Louisiana Constitution	15-16
General Taxing Statute of Louisiana—Act 109 of 1921.	17-18
Discussion of Act 163 of 1924 as being without bearing on this case	18-23
Louisiana Constitutional Exemptions do not involve discrimination against petitioners	23-49
Findings of Fact of Supreme Court are conclusive upon the Supreme Court of the United States except in two classes of cases. Distinction between these classes of cases and the present cases pointed out	49-55
Summary of Findings of Fact of Supreme Court of Louisiana	55-56
Discrimination to be material must be in favor of monied capital which is directly and substantially in competition with that of complainants as actually carried on by them	57-76
Definition of Competition	77-79
Review of Evidence	79-112
Discussion of principle that one attacking the validity of a state taxing statute bears the burden of proof throughout the entire case as to every material allegation of his complaint	112-114
Necessity of considering what was decided by this Court in each case rather than the expressions used by it in order to reconcile jurisprudence and discussion of jurisprudence as thus reconciled	114-139
This Court without jurisdiction to pass upon the correctness of the assessment of furniture and fixtures of petitioners because this question not finally disposed of by Supreme Court of Louisiana	139-140
Conclusion	140-141
DIX—Act 14 of 1917 as amended by Act 116 of 1922 and Act 221 of 1928	143-148

ALPHABETICAL INDEX OF CASES.

	Pages
Adams v. Nashville, 95 U. S. 19; 24 L. Ed. 369	41
American Trust Company v. Crescent Ice Company, 137 La. 139; 68 South. 386	9
Amoskeag Savings Bank v. Purdy, 231 U. S. 373; 58 L. Ed. 274	28, 31, 41, 113, 129
Baldwin v. Missouri, 281 U. S. 586; 74 L. Ed. 1056	22, 139
Bank of Redemption v. Boston, 125 U. S. 60; 31 L. Ed. 689	40, 42
Bemis Brothers Bag Company v. Louisiana Tax Commission, 158 La. 1, 103 South. 337	23, 120
Board of Supervisors v. Stanley, 105 U. S. 305; 26 L. Ed. 1044	62
Bostwick v. Brinkerhoff, 106 U. S. 3; 27 L. Ed. 73	140
Brown v. Baxter, 146 U. S. 619	140
Brown v. Marion National Bank, 36 L. Ed. 1106	140
Bull v. First National Bank of Kasson, 123 U. S. 105; 31 L. Ed. 97	40
California, Bank of, v. Richardson, 248 U. S. 475; 63 L. Ed. 372	41
Cincinnati Street R. Co. v. Snell, 179 U. S. 395; 45 L. Ed. 248	140
Citizens National Bank v. Kentucky, 217 U. S. 443; 54 L. Ed. 832	64
Clairteaux, Succession of, 35 La. Ann. 1178	9
Clark, Succession of, 30 La. Ann. 801	9
Clement National Bank v. Vermont, 231 U. S. 118; 58 L. Ed. 147	41
Cleveland Trust Company v. Lander, 184 U. S. 112; 46 L. Ed. 456	40
Commercial National Bank of Miles City v. Custer County, 245 Pac. 259	135
Cooley on Taxation, Vol. 3, par. 998	13
Covington v. First National Bank, 198 U. S. 100; 49 L. Ed. 963	29, 65
Crescent City Live-Stock Landing, etc. Co. v. Butchers' Union, etc. Co., 120 U. S. 141; 30 L. Ed. 614	50
Creswill v. Grand Lodge K. of P., 225 U. S. 246; 56 L. Ed. 1074	53
Cumberland Coal Co., et al., v. Board of Revision of Tax Assessments of Green County, Pa., 284 U. S. 26; 76 L. Ed. 146	11
Darnell v. Indiana, 226 U. S. 388; 57 L. Ed. 267	66
Davenport National Bank v. Board of Equalization, 123 U. S. 83; 31 L. Ed. 94	32, 42
Davis v. Crouch, 19 U. S. 514; 24 L. Ed. 281	140
Day v. Bailey, 116 La. 961; 41 South. 223	9
Des Moines National Bank v. Fairweather, 263 U. S. 102; 68 L. Ed. 191	41, 117
Egan v. Hard, 165 U. S. 189; 41 L. Ed. 681	52
Evansville National Bank v. Britton, 105 U. S. 322; 26 L. Ed. 1053	129
Farmers Loan & Trust Company v. Minnesota, 280 U. S. 208; 74 L. Ed. 371	22

ALPHABETICAL INDEX OF CASES—(Continued)

Pages

Ferd. Heim Brewing Company v. Belinder, 97 Mo. App. 64; 71 S. W. 691 77

First National Bank v. Anderson, 269 U. S. 341; 70 L. Ed. 295 ..... 29, 41, 80, 118, 129, 131

First National Bank of Garnett, Kansas, v. Ayers, 160 U. S. 660; 40 L. Ed. 573 40

First National Bank v. Board of Reviewers, 41 La. Ann. 188 .. 19

First National Bank v. Chapman, 173 U. S. 205; 43 L. Ed. 669 ..... 31, 40, 45, 57, 115, 129

First National Bank v. County of Chehalis, 166 U. S. 439; 41 L. Ed. 1069 ..... 40, 57, 113

First National Bank v. Hartford, 273 U. S. 547; 71 L. Ed. 767. 71, 117

Georgetown National Bank v. McFarland, 273 U. S. 568; 71 L. Ed. 779 ..... 57, 76, 125

Grand Lodge of Louisiana v. City of New Orleans, 44 La. Ann. 659 19

Grant v. Phoenix Mutual Life Insurance Company, 121 U. S. 105; 30 L. Ed. 905 40

Great Western Teleg. Co. v. Burnham, 162 U. S. 339; 40 L. Ed. 991 140

Hartford Accident & Indemnity Company v. Bunn, 285 U. S. 174; 76 L. Ed. 685 10

Haseltine v. Central National Bank, 183 U. S. 130; 46 L. Ed. 117 140

Hoenig v. Huntington National Bank of Columbus, 59 Fed. (2) 479 46

Jenkins v. Neff, 186 U. S. 230; 46 L. Ed. 1141 ..... 31, 40

Kansas City Southern Railway Company v. Albers Commission Company, 223 U. S. 573; 56 L. Ed. 556 53

Keeney v. Comptroller of the State of New York, 222 U. S. 523; 56 L. Ed. 299 65

Lionberger v. Rowse, 9 Wall. 468; 19 L. Ed. 721 29

Louisiana Code Practice, Art. 905 ..... 10, 50

Louisiana Constitution, Art. X 15

Louisville Gas & E. Co. v. Coleman, 277 U. S. 32; 72 L. Ed. 770 35

McComb v. Knox County, 91 U. S. 1; 23 L. Ed. 366 140

Mackin v. Wilds, 106 La. 1; 30 South. 257 9

Mayre v. Pierson, 133 South. 165; 171 La. 1077 34

Mercantile National Bank v. New York, 121 U. S. 138; 30 L. Ed. 895 ..... 36, 57, 113, 129, 135

Merchants & M. National Bank v. Pennsylvania, 167 U. S. 461; 42 L. Ed. 236 ..... 29, 32

Merchants' Mutual Insurance Company v. Board of Assessors, 40 La. Ann. 371; 3 South. 891 9

Merchants' National Bank of Richmond v. City of Richmond, 256 U. S. 634; 65 L. Ed. 1135 ..... 41, 128, 133

Minnesota v. First National Bank, 273 U. S. 562; 71 L. Ed. 775 74

ALPHABETICAL INDEX OF CASES—(Continued)

	Pages
Montana National Bank v. Yellowstone County, 276 U. S. 499; 72 L. Ed. 673	131
Moore v. Robbins, 18 Wall. 588; 21 L. Ed. 758	140
Morrison v. Larkin, 26 La. Ann. 699	19
National Bank of Commerce v. Seattle, 166 U. S. 463; 41 L. Ed. 1079	57, 114, 129
New Orleans Waterworks v. Louisiana Sugar Refining Company, 125 U. S. 18; 31 L. Ed. 611	51
New Orleans, City of, v. Peoples Insurance Company, 25 La. Ann. 519	19
Northern Pacific Ry. Company v. North Dakota ex rel. McCue, 236 U. S. 585; 59 L. Ed. 735	54
Oliver Iron Mining Company v. Lord, 262 U. S. 176; 67 L. Ed. 935	69
Owensboro National Bank v. Owensboro, 173 U. S. 664; 43 L. Ed. 850	40
Palmer v. McMahon, 133 U. S. 660; 33 L. Ed. 772	31, 40, 44, 57
Parcels v. Johnson, 20 Wall. 653; 22 L. Ed. 410	140
People v. Goldfogle, 242 N. Y. 277; 151 N. E. 452	70
Pepper v. Dunlap, 5 How. 51, 12 L. Ed. 46	140
Plummer v. Coler, 178 U. S. 115; 44 L. Ed. 998	40
Pollock v. Farmers Loan & Trust Company, 157 U. S. 427; 39 L. Ed. 759; 158 U. S. 602; 39 L. Ed. 1108	40
Public National Bank of New York v. Keating, et al., 42 Fed. Rep. (2) 561	136
Pullman Company v. Knott, 235 U. S. 23; 59 L. Ed. 100	68
Rice v. Sanger, 144 U. S. 197; 36 L. Ed. 403	140
Roberts & Schaefer Company v. Emmerson, 271 U. S. 48; 70 L. Ed. 827	60
St. Clair County v. Lovingston, 18 Wall. 628; 21 L. Ed. 813	140
San Francisco National Bank v. Dodge, 197 U. S. 70; 49 L. Ed. 669	28
Seaboard Air Line R. Company v. Watson, No. 4, October Term, 1932, 77 L. Ed.	11
South Carolina v. U. S., 199 U. S. 435; 50 L. Ed. 261	40
Southland Investment Company, Inc., v. Jeter, 171 La. 106; 129 South. 722	19, 21, 23, 120
Stanley v. Board of Supervisors of the County of Albany, 121 U. S. 535; 30 L. Ed. 1000	40
Straus v. Foxworth, 231 U. S. 162; 58 L. Ed. 168	67
Talbott, admr. v. Silver Bow County Commissioners, 139 U. S. 438; 35 L. Ed. 210	40
U. S. R. S., Section 5219	2, 13
Wallis v. Robertson, 10 La. Ann. 215	9
Winn v. Jackson, 12 Wheat. 135; 6 L. Ed. 577	140
Zeller v. Switzer, 91 U. S. 487; 23 L. Ed. 366	140

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 293

FIRST NATIONAL BANK OF SHREVEPORT, ET AL.,

versus

LOUISIANA TAX COMMISSION, ET AL.

BRIEF ON BEHALF OF DEFENDANTS.

The decisions of the Supreme Court of Louisiana in these cases is reported in *143 South. 23; 175 La.* — Advance Sheets September 8th, 1932.

STATEMENT OF THE CASE.

The petitioners, three in number, are all of the national banks in the City of Shreveport, Louisiana. Each filed suit in the appropriate state court to avoid the payment of taxes levied on their capital stock under the provisions of Act 14 of the General Assembly of Louisiana for the year 1917 as amended by Act 116 of 1922 and Act 221 of 1928. This statute as amended is reproduced in full in the appendix to this brief, pages 143 et seq.

Upon motion the three cases were consolidated for purpose of trial (see opinion of district judge *R. 83*, and heading of stenographer's minutes *R. 95*); and in order to facilitate their joint trial it was stipulated that each plaintiff should adopt the allegations in the petitions of the others, that evidence admissible as to one should be admissible as to all, and that the same rule should apply to the answers filed in each case *(R. 95)*.

The substance of the complaint in each case is that other monied capital employed in the same locality in competition with the capital of petitioners is not taxed at all or is taxed less heavily than that invested in petitioners' shares; and that accordingly the Louisiana statute taxing them and the assessments of taxes made against them thereunder for the year 1930 are void because of conflict with *Section 5219 of the United States Revised Statutes (12 U. S. C. A., Sec. 548)* and with the equal protection clause of the *14th Amendment to the Constitution of the United States* and *Section 1 of Article X of the Constitution of Louisiana.*

Petitioners' complaints, as we read them and as construed by the Supreme Court of Louisiana *(R. 664)* are directed solely against the law.

Their petitions contain no allegations that the assessing and taxing authorities have subverted or misapplied the law in taxing them and the other moneyed capital in the parish and state where they are domiciled; they allege no general scheme or even a disposition on the part of the persons charged with the assessment and collection of taxes in Louisiana to impose on them by unfair

administrative methods an unequal share of the tax burden; and their plaint, fairly construed, is, we think, no more than an allegation that the necessary and actual effect of the tax laws of Louisiana (including its constitutional provisions) is to work an unfair discrimination against them in favor of other capital which they allege to be in open and direct competition with them.

> (See petition of First National Bank R. 1 to 9, inclusive, particularly paragraphs 8, 14 and 16. See petition of Commercial National Bank R. 13 to 17, inclusive, particularly paragraph 7. See petition of American National Bank, R. 21 to 30, inclusive, particularly paragraphs 13, 14, 15, 18 and 20).

Concurrence by the petitioners in this construction of their pleadings is evidenced by the statement in their petition for the allowance of an appeal to this court of the ground upon which the jurisdiction of this court is invoked.

> "In said cause there is drawn in question the validity of a statute of the State of Louisiana on the ground that it is repugnant to the constitution and laws of the United States and the decision is in favor of its validity in that petitioners complain that their shares of stock are assessed under Act 14 of the General Assembly of Louisiana of 1917, as amended by Act 116 of 1922 and Act 221 of 1928, at a greater rate than is imposed on other monied capital employed in competition with petitioners, contrary to Section 5219 of the United States Revised Statutes and the equal protection clause in the first section of the Fourteenth amendment of the Constitution of the United States. And petitioners also complain that their personal property is assessed for taxes without authority of law

and in violation of said statutory and constitutional provisions."

(R. 688 and 689).

We ignore the complaint as to the assessment of the personal property of petitioners because the judgment of the state court did not finally dispose of it and expressly left it open for subsequent adjudication.

The defendants, who are the Louisiana Tax Commission and the tax collectors of the State of Louisiana, the Parish of Caddo and the City of Shreveport, denied the discrimination and alleged the nullity because of conflict with state constitutional provisions of Act 163 of 1924, which is one of the acts of which petitioners have complained.

The lower state court held with the petitioners, judgment being rendered in each case annulling the assessment and enjoining the collection of the tax. *(R. 93 and 94)*; but upon appeal the Supreme Court of Louisiana reversed the lower court, holding that the taxation complained of is clearly within the permissive conditions of Section 5219 United States Revised Statutes and does not violate the provisions of either the state or federal constitution. (See opinion Supreme Court of Louisiana *R. 664-682, inclusive.*)

Upon application for a rehearing the Supreme Court of Louisiana amended its judgment so as to reserve to the petitioners:

"any right or action that they or any one of them may have to reduce or annul the assessment of their property for taxes, except upon the complaint that

> the levying of taxes on shares of national bank stock, under the provisions of Act 14 of 1917, as amended by Act 116 of 1922 and Act 221 of 1928, is violative of Section 5219 of the Revised Statutes of the United States.";

all other questions but this having been ignored in the presentation of the cases in the Louisiana Supreme Court *(R. 687)*.

The decree of the Supreme Court of Louisiana reversed the judgment in each case *(R. 644)*; whereupon petitioners appealed to this Court, all three cases being brought up by a single appeal and in one transcript, although three separate bonds were required and were given, two for $1,000.00 each and one for $500.00. *(R. 689-690)*.

Respondents have filed in this court a motion to dismiss the appeal because:

> "the plaintiffs and appellants have embraced in a single appeal the judgments rendered in three separate cases, which cases have never been consolidated except for the purpose of trial and argument and in each of which cases a separate judgment was rendered, which judgment has become final in so far as the state courts are concerned."

and

> "no authority exists under the rules of this Court or of the common law or in the former practice of the King's Bench of Chancery in England for bringing before this court for review by a single appeal judgments rendered in three separate cases, which cases were never consolidated in the true sense but were consolidated for the purpose of trial only in the court of original jurisdiction."

Consideration of the motion to dismiss and of the question of the jurisdiction of this court has been postponed to the hearing on the merits.

On their part petitioners have assigned twelve errors of the Supreme Court of Louisiana in deciding the case against them *(R. 690, 692)*; but in the statement of points on which they intend to rely they have narrowed the issues to be considered by this court to four, to-wit:

> "(1) The invalidity of Act 14 of the General Assembly of Louisiana of 1917, page 20, as amended by Act 116 of 1922, page 241, and Act 221 of 1928, page 289, and the nullity of the assessment thereunder of national bank shares and property because of repugnancy to Section 5219 of the Revised Statutes of the United States U.S.C. Title 12, Sec. 548, as amended by Act of March 25, 1926, C. 88, 44 Stat. 223, and the equal protection clause of the Constitution of the United States.
>
> (2) Error in holding the assessment of national bank shares **under the above statutes** to be valid, and in refusing to annul the assessment of furniture and fixtures and other personal property of national banks.
>
> (3) Error in findings of fact with respect to the employment of capital in the hands of individual citizens of the State in competition with the business of national banks.
>
> (4) Error in finding that national bank shares are not taxed higher than other moneyed capital in the hands of individual citizens of Louisiana employed in competition with the business of national banks.

As we understand the court's rulings on the motion to dismiss and on the question of its jurisdiction, these

matters are to be presented at the same time the case is argued on the merits and should likewise be taken care of in briefing the case.

We shall therefore proceed immediately to a discussion of the motion to dismiss.

DISCUSSION, SUPPLEMENTING BRIEF HERETOFORE FILED IN SUPPORT OF MOTION TO DISMISS APPEAL.

We have heretofore filed a brief in support of our motion to dismiss and have caused to be printed and filed in connection therewith certain portions of the record which we considered particularly pertinent thereto.

Since receiving the printed record we note that the motion to consolidate the cases for the purpose of trial only and the ancillary injunction proceedings in each case in the state district court have been omitted from the printed record. However, they are not necessary to establish the fact that there was no true consolidation of cases here; but only a consolidation for purpose of trial, since there is in the printed record itself adequate and complete evidence on the point.

The stenographer's minutes *(R. 95)* are headed:

> "Evidence adduced on the trial of the above numbered and entitled causes, consolidated for the purpose of trial, at Shreveport, Caddo Parish, Louisiana, beginning on the 28th day of April, A.D.

1931, before the Honorable E. P. Mills, Judge of the First Judicial District Court, Section B, in and for Caddo Parish, Louisiana".

In his written opinion the district judge before whom the case was tried stated *(R. 83)*:

> "The three cases were consolidated for trial, each plaintiff adopting the allegations of the others and it being agreed that the allegations of the answers should be considered as one."

We do not think that anyone at that time was of the opinion that the cases had been consolidated for any purpose other than for the convenience of the parties and of the court in trying them together; and the most positive and convincing proof of that fact is that after the trial and after the district judge had disposed of the three cases in a single opinion three separate judgments (one in each case) were prepared and read in open court by the petitioners and signed by the district judge. *(R. 93-94)*.

This is, we think, the real test of a true consolidation both in Louisiana and elsewhere (see authorities cited in our prior brief in support of motion to dismiss appeal.)

Under the state practice appellants in the state court (respondents here), being state and municipal functionaries, were not required to give an appeal bond,

> *Merchants' Mutual Insurance Company v. Board of Assessors, 40 La. Ann., 371, 3 South., 891;*

and their appeals were perfected by oral motions in open court granted instanter by the district judge.

The minutes of the clerk of the state district court with reference to the allowance of the appeal to the Supreme Court of Louisiana show that the motion was not for an order of appeal but for **orders** of appeal; and except for the fact that the appellants in the state court were within the class which is exempt from giving appeal bonds, it is not open to question that a separate appeal bond would have been required in each case for the maintenance of an appeal from the judgment in that case.

Succession of Clairteaux, 35 La. Ann. 1178;
Day v. Bailey, 116 La. 961; 41 South. 223;
American Trust Company v. Crescent Ice Company, 137 La. 129; 68 South. 386.

The three cases having been tried together, it was permissible under the state practice to make a single transcript do for all three appeals, the separate character of the three suits and of the judgments rendered in those three suits being unaffected thereby, although the more regular practice, of course, would have been to file a separate transcript in each case.

Wallis v. Robertson, 10 La. Ann. 215;
Succession of Clark, 30 La. Ann. 801;
Mackin v. Wilds, 106 La. 1; 30 South. 257.

That the Supreme Court of Louisiana considered that it was dealing with three separate and distinct cases each involving the correctness, *vel non*, of a judgment of the district court is shown by its decree, which annulled the three judgments *(R. 664)* and by its requirement of a

separate bond from each petitioner for an appeal to this court *(R. 690)*.

This court has recently said that it will not go behind the wording of a judgment of the court below to determine what the court meant by that judgment, but will accept the terms of the judgment as entered,

Hartford Accident & Indemnity Company v. Bunn, 285 U. S. 174; 76 L. Ed. 685;

and, as we have before said, if the wording of the judgment of the Supreme Court of Louisiana is looked to in this case, it is clear that what the court did was to annul three judgments in these three cases.

It is equally clear that under Louisiana practice and law its mandate was applicable to each case separately and had the effect of dismissing that case *ab initio*.

> "When the Supreme Court reverses the judgment of an inferior court, it shall pronounce on the case the judgment which the lower court should have rendered, if it be in possession of all the facts and testimony to enable it to pronounce definitively."
>
> *Art. 905, La. Code Practice.*

As a result of the judgment of the Supreme Court in each of these cases, each plaintiff has been made responsible for the cost in its particular case; and the state Supreme Court evidently thought that it was maintaining the separate identity of the three plaintiffs in this respect at least by requiring an appeal bond from each of them.

In the brief for petitioners opposing the motion to dismiss the appeal, the position seems to be taken that be-

cause it was permissible under Louisiana practice to use a single transcript for three separate appeals, the same rule must hold good in this court; but we do not think that the conclusion logically follows. The practice in perfecting an appeal from a Louisiana district court to the Louisiana Supreme Court is certainly not the criterion of the practice in the matter of appeals to this Court, which has its own rules, a compliance with which is essential to the maintenance of an appeal here.

Seaboard Air Line R. Co. v. Watson, No. 4, October Term, 1932, 77 L. Ed. —.

The reversal by the Supreme Court of Louisiana of three separate judgments in a single opinion means no more than that there are now three judgments in favor of respondents where previously there were three judgments against them; and in order to obtain the revision of these three judgments by this court it is essential that an appeal should be taken in each case.

This was the procedure followed by able counsel for petitioners in the cases of *Cumberland Coal Company, Henry A. Phillips, Piedmont Coal Company and Green County Coal Company v. Board of Revision of Tax Assessments of Green County, Pennsylvania, 284 U. S. 26; 76 L. Ed. 146;* where seven cases were heard together in the state court and decided in a single opinion and where seven appeals were taken and perfected; and such has, we think, been the generally accepted practice in this court

and in most other courts of final resort from time immemorial.

We have made no contention as to the right of petitioners to appeal to this court from the decision of the Supreme Court of Louisiana, because as their pleadings have been construed by us and by the Supreme Court of Louisiana they have assailed the validity as applied to them of a tax statute of the state of Louisiana on the ground of conflict with a federal statute and the federal constitution and the state court has held the statute to be valid; but we think that the jurisdiction of this court must be regarded as limited to a consideration of the validity of the statute itself and does not extend to the question of the legality of the assessments complained of on the ground of discrimination in the administration of the state tax laws as distinguished from a discrimination worked by the terms of the statute itself. When the issue is thus narrowed down, it is doubtful that any substantial federal question is presented, since the taxing system of the state of Louisiana as set forth in its constitution and statutes is obviously not prejudicial or unfair to petitioners and as obviously not in conflct with U.S.R.S. 5219.

This is a matter, however, the determination of which involves an examination of the constitutional provisions and statutes in question; and we therefore pass on to the merits of the case.

ARGUMENT.

If Your Honors Please:

We should like for the Court to note that wherever a passage is printed in boldface type in the brief the boldface type is ours.

It is, of course, conceded that the power of the state to tax the plaintiff banks is derived solely from the permission given by Congress and contained in *Section 5219* of the U. S. Revised Statutes, which authorizes such taxation in the manner in which Louisiana has elected to tax the capital of national banks upon these conditions:

> "1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.
>
> (b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State **coming into competition** with the business of national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

In the Fourth Edition of *Cooley on Taxation, Vol. 3, par. 998*, it is said:

> "The federal statute provides that the tax on shares of stock in national banks shall not be at a 'greater rate' than is assessed upon 'other moneyed capital' in the hands of individual citizens of such

state. It therefore becomes necessary to first consider what is meant by 'greater rate' and by 'other moneyed capital.' As might have been expected, the vagueness of this provision has given rise to much litigation, and the courts, including the Supreme Court of the United States, have frequently been called upon to construe and apply it to the tax laws of the various states. The result of the decisions is not entirely clear, but some points seem to be settled.

The main purpose of Congress in thus limiting the power of the states to tax investments in shares of national banks was to render it impossible for a state, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of like character; and this must be taken into consideration in construing the act."

In the instant case the plaintiffs complain of tax discrimination in favor of:

"* * * homestead and building associations, Federal Joint Stock Land Banks, associations commonly called Morris Plan Banks and Morgan Plan Banks, small loan companies licensed under Act No. 7 of the Extra Session of the Legislature of 1928, finance and securities companies licensed under Act No. 221 of the legislature of 1926, pawnbrokers, life insurance companies, real estate mortgage investment companies, bond and investment brokers * * *."

(R. 11-15-24).

The plaintiffs likewise complain of discrimination in favor of the Federal Farm Loan Banks and further complain that they are discriminated against by the terms of Act 163 of the Louisiana legislature for the year 1924, which purports to exempt from taxation ninety per cent.

of the market value of bonds of any state and the political subdivisions thereof, bonds of railways, railroads and other public utilities and manufacturing and industrial corporations.

The answer of the respondents denies the discrimination and likewise denies that the monied capital, discrimination in favor of which is alleged by the petitioners, is used in competition with the business of the plaintiff banks as actually carried on by them.

Two issues are thus presented, one as to discrimination and the other as to competition.

Let us first see about the **discrimination.**

Taxation in Louisiana as a system is provided for in the Constitution and the statutes of the state. The *Constitution in Article X*, after providing for taxation of all property other than that exempt, declares in *Section four* that:

> "The following property, and no other, shall be exempt from taxation:
>
> "All public property.
>
> "Places of religious worship; rectories and parsonages belonging to religious denominations, and used as places of residence for ministers; places of burial; property devoted to charitable undertakings, including that of such organizations as lodges and clubs organized for charitable and fraternal purposes and practicing the same; schools and colleges; but the exemption shall extend only to property, and grounds thereunto appurtenant, used for the above mentioned purposes, and not leased for profit or income.

"Cash on hand or on deposit; loans or other obligations secured by mortgage on property located exclusively in the State of Louisiana, and the notes or other evidence thereof; loans by life insurance companies to policyholders, secured solely by their policies; loans by homestead associations to their members, secured solely by stock of such associations; debts due for merchandise or other articles of commerce or for services; obligations of the State or its political subdivisions; household property to the value of one thousand dollars; the legal reserve of life insurance companies organized under the laws of this State; property belonging to any military organization of the State, used by the State National Guard or militia for military purposes; agricultural products while owned by the producer; agricultural implements and farm improvements to the value of five hundred dollars; hogs, sheep and goats for personal use; books, philosophical apparatus and paintings kept in a public hall; the real estate and appurtenant property constituting auditoriums, opera houses, temples of music, museums of art or carnival organizations, conducted as civic enterprises for the public welfare, while used solely for the promotion of art and not operated for profit to the owners; property belonging to the agricultural fair associations and used exclusively in the conduct of such fairs; ships and ocean-going tugs, tow-boats and barges, engaged in over-seas trade and commerce and domiciled in Louisiana ports; provided, this exemption shall not apply to harbor, wharf, shed, and other port dues, and no ship, tug boat or barge operated in the coastal trade of the continental United States shall be within the exemption herein granted."

It seems to us plain under this constitutional provision that the Legislature is altogether without power to exempt from taxation all or any part of property which

the Constitution itself does not so exempt. It will likewise be noted that the only exemptions of credits are mortgage loans, loans by life insurance companies to their policyholders on their policies, loans by homestead associations to their members on their stock, debts due for merchandise or other articles of commerce or for services and obligations of the state or its political subdivisions. Other than these, all credits are taxable and must be taxed; and any attempt by the Legislature or by taxing authorities to exempt any credits other than those which we have recited is on its face void.

In the general taxing statute which was enacted shortly after the *Constitution of 1921* became effective, the Legislature appears to have done its best to insure the taxation of all property other than that exempted under the constitutional provisions cited. The language could hardly be broader than it is:

> "*Section 1.* Be it enacted by the Legislature of Louisiana, That for the calendar year one thousand nine hundred twenty-two (1922) A.D., and each succeeding calendar year, there are hereby levied for State purposes, annual taxes amounting in the aggregate to five and one-quarter mills (.005¼) on the dollar of the assessed value of all property situated within the State of Louisiana, except such as is especially exempted from taxation by law, and all property subject to taxation shall be assessed for State purposes, as herein provided, **at actual cash value.**
>
> "*Section 2.* That the term 'property' as herein used shall embrace and include every form, character and kind of property, real, personal, and mixed, tangible and intangible, corporeal and incorporeal and every share, right, title or interest

therein or thereto, and every right, privilege, franchise, patent, copy-right, trade-mark, certificate, or other evidence of ownership or interest; bonds, notes, judgments, credits, accounts, or other evidence of indebtedness, and every other thing of value, in possession, on hand, or under the control, at any time during the calendar year for which taxes are levied, within the State of Louisiana, of any person, firm, partnership, association of persons, or corporation, foreign or domestic, whether the same be held, possessed, or controlled, as owner, agent, pledgee, mortgagee, or legal representative, or as president, cashier, treasurer, liquidator, assignee, master, superintendent, manager, sequestrator, receiver, trustee, stake-holder, depository, warehouseman, keeper, curator, executor, administrator, legatee, heir, beneficiary, parent, attorney, usufructuary, mandatory, fiduciary, or other capacity, whether the owner be known or unknown.

"*Section 3.* That there shall be exempt from taxes levied by this act all property which is declared to be exempt from taxation by Section 4 of Article X of the Constitution of 1921, and no other; but all real estate, exempt as well as taxable, shall be valued at actual cash value, listed on the assessment rolls and submitted to the Louisiana Tax Commission."

* * * * * *

It must, we think, be admitted that if the taxing authorities have kept in mind the definition of the term "property" as set forth in *Act 109 of 1921*, then they and the Legislature have done everything in their power to insure the equal taxation of every character of property not especially exempted by the Constitution.

In *Act 163 of 1924* the Legislature, it is true, did attempt to exempt from taxation ninety per cent. of the

market value of bonds of any state and the political subdivisions thereof, bonds of railways, railroads and other public utilities and manufacturing and industrial corporations; but whether or not this act, if it had been given practical effect, would have produced a discrimination against the plaintiff banks, the Court is not, in our opinion, required here to consider for two reasons. The first reason is that the act is void on its face, it being the settled jurisprudence of Louisiana that the Legislature may not, directly or indirectly, exempt any property or any portion of the value of any property from taxation except where the Constitution has authorized such exemption.

First National Bank v. Board of Reviewers, 41 La. Ann. 188;

City of New Orleans v. Peoples Insurance Company, 25 La. Ann. 519;

Morrison v. Larkin, 26 La. Ann. 699;

Grand Lodge of Louisiana v. City of New Orleans, 44 La. Ann. 659;

Southland Investment Company v. Jeter, 171 La. 106.

In the first cited case the Supreme Court of Louisiana, through Mr. Justice Fenner, said:

> "Reduced to its last analysis, the contention is that a large part of the value of the shares belonging to the individual shareholders of the bank is exempt from taxation; for though the question assumes the form of a question of assessment, it would be a self-evident quibble to say that there can be any difference between an exemption from assessment and an exemption from taxation.

"We read in the Constitution the unequivocal mandates: 1. That 'all property shall be taxed in proportion to its value, to be ascertained as directed by law.' 2. That 'the following property shall be exempt, and no other'.

"Bank shares are property. They are subject to taxation, and in this statute, the Legislature has affirmatively exercised the power of taxing them. It is not disputed that the value of these shares, as ascertained by law, exceeds the value at which they have been assessed. It is simply claimed that a portion of this value is exempted from assessment and consequently from taxation. The claim is that, after ascertaining the value of the shares, the value of the United States and State bonds held by the bank, is to be deducted from that valuation, and that the shares are to be taxed, not according to their value, but according to a fraction of their value, as thus reduced.

"The question naturally arises: Whence would the Legislature derive the power thus to disobey the constitutional mandate that 'property shall be taxed according to its value' and to exempt this large part of the 'ascertained value' of these shares from taxation?

"If anything can be settled by jurisprudence, it is settled in this State that the Legislature is absolutely stripped of power to exempt any property **or value** from taxation, and that when such exemption is claimed, it can be supported only by some provision found in the paramount law. State ex rel. DaPonte vs. Board, 35 Ann. 654; La. Cotton Mf'g. Co. vs. City, 31 Ann. 443; City vs. Lafayette, 28 Ann. 756; City vs. St. Patrick's, 28 Ann. 512; City vs. St. Charles, 28 Ann. 498; (Moore v. Beelman) 27 Ann. 276; (City of New Orleans v. People's Bank) Id. 646; (City of New Orleans v. Metropolitan Loan, Saving & Pledge Bank) Id., 648."
(188-189).

In the case of *Southland Investment Company v. Jeter, 171 La. 106*, it was said:

> "If Act No. 7 of the Extra Session of the Legislature for the year 1928 is to be given the effect contended for by counsel for plaintiff, we would have a situation presented whereby a legislative act exempts from taxation something of assessable value which the Constitution says shall not be exempt. The words of the Constitution are:
>
> 'The following property, **and no other,** shall be exempt from taxation.'
>
> "We do not think it was the legislative intent to give Act No. 7 of the Extra Session of 1928 such effect. If, however, we are mistaken, the act would not stand the test of constitutionality. The warrant or authority for making the assessment, and for the imposition of the tax, rests upon the fact that credits are intangible property of value. The Constitution does not exempt such property from taxation, but specifically provides that all property of every kind and description, in the state, shall be assessed at its actual value, and, except such property as the Constitution exempts from taxation, shall be subject to taxation."

The second reason is that Mr. Jeter, the tax assessor of Caddo Parish, testified *(Ev. p. 96)* that he has not been able to find in Caddo Parish any securities of the kind described in the act under discussion, from which it naturally follows that the act has had no practical or substantial effect whatsoever as regards the plaintiff banks.

This was the conclusion reached by the Supreme Court of Louisiana, which held that:

> "The statute is so palpably violative of the constitutional requirement that all property that is

subject to taxation shall be assessed at its actual cash value, that it has never been enforced. City of New Orleans v. Peoples Insurance Co., 27 La. Ann. 519; and Morrision v. Larkin, 26 La. Ann. 699; First National Bank v. Board of Reviewers, 41 La. Ann. 188; Grand Lodge v. City of New Orleans, 44 La. Ann. 659; Southland Investment Co. v. Jeter, 171 La. 106. Mr. Jeter is the tax assessor for Caddo Parish; and he testified in this case that he had not been able to find in the parish any of the securities referred to in Act 163 of 1924. It is certain, therefore, that the statute has not had any effect upon the business of the plaintiffs."

(R. 676).

Regarding for a moment the constitutional exemptions, the learned counsel for plaintiffs will look in vain there for any forbidden discrimination. The exemption of cash on hand is not a discrimination, for cash is dormant capital and not capital used in competition with national banks or anyone else; in fact, the banks in Shreveport have almost all the cash there is in the town.

Loans by life insurance companies domiciled out of the state to their policy holders may not be constitutionally taxed by the State of Louisiana, as the domicile of such credits is the domicile of their owners on the principle *mobilia personam sequuntur;* and it is not shown that any life insurance company domiciled in Louisiana makes loans in competition with the plaintiff banks in Caddo Parish or elsewhere in the state.

Farmers Loan & Trust Company v. Minnesota, 280 U. S. 208, 74 L. Ed. 371;

Baldwin v. Missouri, 281 U. S. 586; 74 L. Ed. 1056.

The exemption of mortgages on real estate in Louisiana works no injury to the plaintiff banks, for the reason that the evidence shows that they consistently avoid this type of loan.

Obligations of the state or its political subdivisions are exempted under the public policy of the state, while as to the exemption of debts due for merchandise or for other articles of commerce or for services, it suffices to say that these credits are not of the type in which the plaintiff banks invest their funds.

All other credits of every kind and nature are assessable and taxable under the laws of Louisiana.

Bemis Brothers Bag Company v. Louisiana Tax Commission, 158 La. 1;
Southland Investment Company v. Jeter, 171 La. 106.

Here, again, we turn to the opinion of the Supreme Court of Louisiana as the most authoritative exposition of the manner and effect of taxation in Louisiana as applied both to the plaintiff banks and to such other monied capital as they claim is exempted or favored to their prejudice.

> "The state levies taxes on every other corporation, other than those engaged in the banking business, by assessing the property of the corporation in the name of the corporation, just as the property of an individual is assessed in his name. But, to avoid double taxation, the capital stock of corporations other than those engaged in the banking business is not assessed for taxes. On the other hand, the capital stock of corporations engaged in the banking business is assessed for taxes, at the

book value of the stock, less the value of the real estate owned by the bank, which real estate is also assessed for taxes; but no other property of such corporations is assesed for taxes.

The complaint of the plaintiffs in this suit, stated broadly, is that, by assessing the capital stock of banks, instead of assessing their property, and by assessing the property of corporations that compete with the banks in some parts of their business, instead of assessing their capital stock, the state is discriminating against the banks, in that they do not have the benefit of the exemptions from taxation, provided for in the constitution, and the corporations competing with them in a part of their business do have the benefit of such exemptions. The plaintiffs have reference, particularly, to the exemptions (in Sec. 4 of Art. X) of cash on hand or on deposit; loans or other obligations secured by mortgage on property located exclusively in the state, and the notes or other evidences thereof; loans by life insurance companies to policyholders, secured only by their policies; loans by homestead associations to their members, secured only by the stock of such associations; debts due for mechandise or articles of commerce or for services; and obligations of the state or its political subdivisions. The plaintiffs contend also that there is a discrimination against them in that, in the assessment of credits, meaning, particularly, promissory notes, bills and accounts receivable, not exempt from taxation, a deduction is made of bills and accounts payable, not exempt from taxation as the property of the party to whom they are payable. Act 24 of 1918. The purpose of that is to avoid double taxation. New Orleans Securities Co. v. City of New Orleans, 173 La. 1097, 139 So. 635. That is the purpose also of the exemption of promissory notes or other evidences of debt secured by mortgage on property which bears its just proportion of taxes,

and debts due for merchandise or articles of commerce.

At first thought it seems that, if the capital stock, instead of the property, of a corporation is taxed, as in the case of corporations engaged in the banking business, the stockholders do not have the benefit of the exemptions which we have mentioned, or the benefit of the right to offset their bills and accounts receivable by the bills and accounts payable, not exempt from taxation. But that is not true. As a matter of mathematics, it is certain that there is no discrimination, in that respect, against the banking corporations, whose capital stock is assessed for taxes, or in favor of the corporations whose property is assessed for taxes. The reason why there is no discrimination, in that respect, is that the book value of bank stock, which value (after deducting the value of the bank's real estate) is the value at which the stock is assessed for taxes, is the difference between the value of the bank's assets and the amount of its liabilites. In other words, in computing the value at which bank stock must be assessed, all of the bank's bills and accounts payable are deducted. It is true that, among the assets that go to make up the book value of bank stock, there are included bills and accounts receivable which, if they belonged to a corporation not engaged in the banking business, might be exempt from taxation; but, among the liabilities which go to lessen the book value of bank stock, are all of the bills and accounts payable, whether exempt or not exempt from taxation; whereas, in the assessment of the bills and accounts receivable belonging to all other corporations, except those engaged in the banking business, the only bills or accounts payable that are deducted from the amount of the bills and accounts receivable are those that are not exempt from taxation, as the property of those to whom they are payable. It is impossible, therefore,

for the exemptions from taxation, which the plaintiffs complain of, to operate as a discrimination against the stockholders of corporations engaged in the banking business, or in favor of the stockholders of corporations competing for a part of the banking business, merely because the banks are taxed by the assessment of their capital stock and the other corporations are taxed directly by the assessment of their property.

* * * * * *

The complaint that the owners of bank stock are discriminated against because the method of assessment does not admit of offsetting bills and accounts receivable by bills and accounts payable was urged in People of New York ex rel. Amoskeag Savings Bank v. Purdy, Commissioner, 231 U. S. 373, 58 L. Ed. 274, with regard to the same method of taxation that is complained of here; and the court rejected the complaint, thus.

> 'According to this practical test, it seems to us that the scheme adopted by the state of New York for taxing shares in national banks cannot upon this record be denounced as violative of the limitations prescribed by #5219, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3502). The holders of shares in state banks are subjected to precisely the same taxation, and with respect to other competitive institutions, such as trust companies, the franchise taxes imposed upon them apparently result in a substantially similar burden upon the shareholders. Nor is there any discrimination in favor of savings banks. With respect to individual bankers, there is a difference, they being apparently subject to the local rate of taxation, and entitled to the privilege of deduction for personal debts; but, as they are taxable upon the amount of the capital, invested in the banking business, which is normally only such as remains

after the deduction of debts, it is not plain that they possess any valuable privilege of reducing the tax assessment by deducting debts. Foreign bankers are separately treated, for reasons sufficiently obvious; but no criticism is made of this. If there be other forms of "moneyed capital in the hands of individual citizens" of the state employed in a banking or quasi-banking business in competition with the national banks, and which are subjected to a more favorable rule of taxation, our attention is not called to them. Moreover, we agree with what was said by the court of appeals of New York in th Feitner Case (191 N. Y. 88, 96, 83 N.E. 592) that "the state is not obliged to apply the same system to the taxation of national banks that it uses in the taxation of other property, provided no injustice, inequality, or unfriendly discrimination is inflicted upon them."'

The record here discloses that the plaintiffs are not really concerned with the tax exemptions complained of in their petition. The exemption of cash on hand or on deposit, for example, is not a discrimination against the banks, because cash on hand or on deposit is idle capital, and not moneyed capital coming into competition with the business of national banks. The exemption of loans secured by mortgages is not a discrimination against national banks, because, as shown by the testimony of their officers they consistenly avoid such loans. The exemption of loans made by life insurance companies to their policyholders and secured by their policies is a matter of no concern to the banks, not only because, in the very nature of things, they cannot make such loans on the same terms or basis, but also because the state has no right to tax loans made by insurance companies domiciled in other states, and, as far as the record shows, there are no loans made by life insurance companies domiciled in this

state. The exemption of loans made by homestead associations to their members secured only by the stock of such associations, was found by the district judge to be not a discrimination against the banks, or their shareholders. That subject will be discussed hereafter with reference to the several institutions which the plaintiffs say are their competitors. The exemption of debts (meaning credits) due for merchandise or articles of commerce, which are supposed to have borne their just burden of taxation, is made for the purpose of avoiding double taxation, and is a matter which does not concern the banks because they do not deal in merchandise or such articles of commerce as the exemption has reference to. The exemption of the obligations of the state and its political subdivisions is also a matter of public policy, which does not concern the banks because they do not take such securities as a matter of investment but only for immediate sale."

(R. 666 to 670 inc.)

The decision in the case of *Amoskeag Savings Bank v. Purdy, 231 U. S. 373, 58 L. Ed. 274*, which the Supreme Court of Louisiana held was directly applicable to the system of taxation in Louisiana, followed closely and was predicated upon the decision in the case of *San Francisco National Bank v. Dodge, 197 U. S. 70, 49 L. Ed. 669*, in which the Court found that national banks were discriminated against by the laws of California for other reasons stated in the opinion and accordingly held the tax on national bank shares void, it nevertheless overruled the contention of the plaintiff in that case to the effect that a discrimination resulted because the state law taxed shares of stock in national banks and did not tax such shares in state banks and other state moneyed corporations. It was shown that in lieu of a tax on the shares of the state corporations,

the corporations themselves were taxed upon their net worth, just as is done in Louisiana today. That part of the decision which is pertinent here reads as follows:

> "The first contention is that the law of 1899 is on its face in conflict with par. 5219 of the Revised Statutes, because it taxes shares of stock in national banks, and does not tax such shares in state banks and other state moneyed corporations. As it is patent that the state banks and corporations are taxed on their property, the proposition reduces itself to this: That the states may not pursue the method permitted by the act of Congress of taxing shares of stock in national banks, unless the same method is employed as to the stock of state banks and other state moneyed corporations.
>
> "In Davenport Nat. Bank v. Board of Equalization, 123 U. S. 83, 31 L. ed. 94, 8 Sup. Ct. Rep. 72, it was decided that the provision of par. 5219 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3502), authorizing the taxation of shares of stock in national banks, but exacting that the tax when levied should be at no greater rate than that imposed on other moneyed capital, did not require the states, in taxing their own corporations, 'to conform to the system of taxing national banks upon the shares of their stock in the hands of their owners'."
>
> *(673-674).*

In addition to these two cases, the following decisions of this Court are directly in point:

Lionberger v. Rowse, 9 Wall. 468, 19 L. Ed. 721;

Merchants & M. National Bank v. Pennsylvania, 167 U. S. 461, 42 L. Ed. 236;

Covington v. First National Bank, 198 U. S. 100, 49 L. Ed. 963;

First National Bank v. Anderson, 269 U. S. 341, 70 L. Ed. 295.

On the question of discrimination, then, we earnestly contend and we respectfully submit that neither the Constitution nor the laws of Louisiana furnish ground for any just complaint as to such discrimination and that the fact that in a few cases certain capital may have escaped taxation either in whole or in part through errors or omissions upon the part of the taxing authorities or through particular conditions not contemplated or reasonably anticipated in framing this system of taxation, will not invalidate the taxation of national banks under that system when, as in the case of the taxing system of Louisiana, it may reasonably be expected to as nearly approximate equality and fairness as is possible in such matters.

In the briefs of the learned counsel for the plaintiffs a great deal of emphasis is placed upon the fact that the total assessment of credits in Caddo Parish where the plaintiff banks are domiciled is less than $60,000.00, and the total assessment of credits in the State of Louisiana is less than $3,000,000.00. From these figures alone it is insisted that it necessarily follows that moneyed capital of individual citizens benefit from a discrimination in its favor and against the capital invested in the plaintiff banks. No evidence, however, has been offered to show that there are in Caddo Parish or in the State of Louisiana large amounts of moneyed capital not exempt from taxation under the provisions of the Constitution of Louisiana in excess of the amounts which the assessors have been able to find and assess; and the Court is asked to take judicial notice of the existence of large quantities of unassessed and untaxed moneyed capital. No reason is suggested, however, for such judicial assumption and that the plain-

tiffs must rely upon positive and convincing proof of discrimination and not upon judicial notice of assumed facts in cases such as these is not open to question.

Amoskeag Savings Bank v. Purdy, 231 U. S. 373, 58 L. Ed. 274;
Jenkins v. Neff, 186 U. S. 230, 46 L. Ed. 1141;
First National Bank v. Chapman, 173 U. S. 213, 43 L. Ed. 673.

It is equally well settled that to constitute a discrimination of which the courts will take notice it is not sufficient to show that the method of administration of the tax laws leads to inequality or favoritism in particular cases, although "systematic and intentional omission to tax a material portion of other moneyed capital" does constitute a violation of the prohibition of the federal statute.

Palmer v. McMahon, 133 U. S. 660, 33 L. Ed. 772.

It is likewise the settled construction of the statute that it is not violated by a discrimination in favor of another federal agency, even though that federal agency be a national bank directly in competition with the complaining bank, so that if there should be a discrimination in favor of such national agencies as the federal farm loan banks in Act 116 of 1922, and if the Court should be of opinion that these federal farm loan banks are not within the same rule as building associations and other public or semipublic organizations which the public policy of the state requires it to encourage and foster, even then the discrimination in favor of the federal farm loan banks

would have no bearing upon the validity of the assessment of the plaintiffs in these cases.

Davenport National Bank v. Board of Equalization, 123 U. S. 83, 31 L. Ed. 94;
Merchants & M. National Bank v. Pennsylvania, 167 U. S. 461, 42 L. Ed. 236.

Upon the facts, therefore, as alleged and proven in these cases, it does not appear that there is any material and substantial discrimination of any kind against the plaintiff banks in the matter of assessment and taxation of their shares; **on the contrary, the evidence shows without dispute that the market value of their shares is considerably in excess of the book value and inasmuch as the assessment here complained of is an assessment based only on the book value of the shares their capital is assessed upon less than its actual value, whereas, the taxing statutes require other capital to be assessed at its full actual value.** What discrimination there appears to be, then, as shown by the evidence in these cases is discrimination in favor of and not against the plaintiffs here, except possibly in some cases where the assessor may have failed to get property on the rolls which under the law he was required to assess.

We have just received a copy of the brief for petitioners here and we note that they still insist that the tax exemption established in favor of building associations in Louisiana contravenes the conditions upon which Congress has consented that the states may tax national banks.

With this contention the state Supreme Court flatly disagreed; and we submit that it was plainly right in so doing.

It should be noted that in Louisiana building and loan associations are semipublic institutions, neither organized nor operated for profit and are, under the settled public policy of the state, especially favored by tax and other exemptions.

In *Section 4, Article 10 of the Constitution*, loans by homestead associations **to their members,** secured solely by stock of such association and loans secured by mortgage on property located exclusively in the state of Louisiana, are both exempt from taxation, just as are public property, places of religious worship, property devoted to charitable undertakings and other property which the public policy of the state requires to be exempt from tax burdens.

As far back as 1888 the benefits to the public from the operation of homestead associations in Louisiana were recognized by the Legislature.

Act 151 of 1888, page 212, reads:

> "Be it enacted by the General Assembly of the State of Louisiana, That the terms 'public utility and advantage' in the Revised Statutes, section six hundred and eighty-three (683), and in all laws, amendatory thereof, be held to include in their meaning the object and purposes of homestead, or building associations, societies and companies as now established in this State."

In the very recent case of *Mayre v. Pierson, 133 South. 165, 171 La. 1077*, the Supreme Court of Louisiana thus defined the public policy of the state of Louisiana towards building associations and stated the character of the business of building and loan associations in Louisiana:

> "The purposes for which building and loan associations are established is to enable persons of small means and limited incomes to acquire homes and thus become better citizens and more identified with the welfare and growth of the community. Because of the advantageous results attending the operation of such associations and their beneficent purpose, they have been favored and granted special privileges by various state Legislatures. Our own Legislature has deemed it to be in the interest of our people to encourage the formation and operation of building and loan associations, and has enacted special laws giving them certain well-defined powers and privileges to be exercised in the promotion of their objects.
>
> Building and loan associations do not engage directly in the business of purchasing and selling real estate or in the erection or improvement of buildings. They are strictly loan associations, and assist in the acquisition of homes or the erection and improvement of buildings only so far as they afford facilities to their members of borrowing the necessary money for such purposes. Ordinarily, therefore, the transaction by which a building and loan association lends money to one of its members and secures such loan by a charge on the property of such member would be classed as a mortgage, except for the fact that our Legislature has deemed it well, in pursuance of its policy to encourage the formation and operation of building and loan associations, to invest such a transaction with the status of a sale so as to secure the amount due by the bor-

> rowing member by a vendor's lien and privilege on the property affected. Since liens and privileges are created by law, it was within the power of the Legislature to do this."

That building associations are the proper subjects of special favoritism and tax exemptions and discriminations as against other money-lending institutions has been consistently recognized by Congress in its income tax acts, such associations when mutual being exempted from the payment of income tax, and investments in their stock being encouraged by the omission from income in which an income tax has to be paid of dividends on such stock not exceeding a certain annual sum. In fact, it may be with truth said that the recognition of the usefulness and advantage of these associations to the public and of the propriety of special consideration being given to them in the fiscal policy of the states is universal.

As said by this Court in the late case of *Louisville Gas & E. Company v. Coleman, 277 U. S. 32, 72 L. Ed. 770,* in considering the exemption from a tax upon mortgages of mortgages executed to building and loan associations:

> "The exemption of building and loan associations from the operation of the tax is a different matter. The equal protection clause of the 14th Amendment does not preclude a state in imposing taxes from making exemptions, provided the power is not exercised arbitrarily. It may exempt the property of churches, charitable institutions, and the like; and it does not admit of fair doubt that, under the circumstances disclosed by the opinion of the court below in the Middendorf case, it has lawfully exempted building and loan associations. That court points out that a building and loan asso-

> ciation under the Kentucky statutes must receive payments from members only and make loans to members only, in pursuance of a plan set forth. Money accumulated is to be loaned to members according to a rule of priority. The essential principle of such an association is mutuality. The purpose of the statute, the court below says, was to provide the members of the association with the means of borrowing money for the acquisition of homes, in recognition of the duty of the state to encourage the acquisition of homes by its citizens. Such associations are also placed by the state statute in a separate class for purposes of ad valorem taxation. It is made clear by the lower court that the purpose of the exemption was to enable these associations, by relieving them of a burden, more completely to carry out the quasi public purpose which the Legislature designed in providing for their creation. This exemption, therefore, must be upheld."

Certainly it cannot be successfully denied that building associations are to be regarded in as favorable a light as concerns the question under consideration here as are mutual savings banks which, like building associations, were originally organized for semipublic purposes, although, unlike building associations, they have not continued to function only as mutual institutions.

In the case of the *Mercantile National Bank v. New York, 121 U. S. 138, 30 L. Ed. 895*, the Bank was seeking relief from state taxation chiefly because of the exemption from such taxation of trust companies, life insurance companies and mutual savings banks. The question of the permissibility of these exemptions under the act of Congress permitting the assessment of shares of stock of na-

tional banks was discussed at great length in the cited case; and the conclusion reached that although the evidence showed that the exemptions affected moneyed capital, the aggregate of which was far in excess of the moneyed capital employed by all of the national banks in New York, nevertheless the law of New York as it then stood did not violate the prohibition of the act of Congress because the exceptions applied either to capital that was not in competition with the capital employed in national banks or to capital which the public policy of the state reasonably required should be exempt from taxation. This opinion has been so often cited as good authority in later decisions that we feel justified in quoting from it at some length:

> "The key to the proper interpretation of the Act of Congress is its policy and purpose. The object of the law was to establish a system of national banking institutions, in order to provide a uniform and secure currency for the people, and to facilitate the operations of the Treasury of the United States. The capital of each of the banks in this system was to be furnished entirely by private individuals; but, for the protection of the government and the people, it was required that this capital, so far as it was the security for its circulating notes should be invested in the bonds of the United Staes. These bonds were not subjects of taxation; and neither the banks themselves, nor their capital, however invested, nor the shares of stock therein held by individuals, could be taxed by the States in which they were located without the consent of Congress, being exempted from the power of the State in this respect, because these banks were means and agencies established by Congress in execution of the powers of the Government of the United States. It was deemed consistent, however, with these national uses, and other-

wise expedient, to grant to the States the authority to tax them within the limits of a rule prescribed by the law. In fixing those limits it became necessary to prohibit the States from imposing such a burden as would prevent the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote. The business of banking, including all the operations which distinguish it, might be carried on under state laws, either by corporations or private persons, and capital in the form of money might be invested and employed by individual citizens in many single and separate operations forming substantial parts of the business of banking. A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of state laws were exempt from an equal burden. The main purpose, therefore, of Congress, in fixing limits of state taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the Act of Congress is to be read in the light of this policy.

* * * * * *

"According to the stipulation in this case, the deposits in such banks amount to $437,107,501, with an accumulated surplus of $68,669,001. **It cannot be denied that these deposits constitute moneyed capital in the hands of individuals within the terms of any definition which can be given to that phrase; but we are equally clear that they are not within the meaning of the Act of Congress in**

such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must thereby also be exempted from taxation. No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States. They are what their name indicates, banks of deposit for the accumulation of small savings belonging to the industrious and thrifty. To promote their growth and progress is the obvious interest and manifest policy of the State. Their multiplication cannot in any sense injuriously affect any legitimate enterprise in the community. We have already seen that by previous decisions of this court it has been declared that 'it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt'—Hepburn v. School Directors, 23 Wall. 480 (supra)—and that 'the Act of Congress was not intended to curtail the state power on the subject of taxation. **It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property, if the Legislature chose to do so.' Adams v. Nashville, 95 U. S. 19 (24:369). The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exemptions should be founded upon just reason, and not operate as an unfriendly discrimination against investments in national bank shares. However large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation."**

That the decision in this case correctly states the law as it was and as it is construed by this Court from that time to this is shown by the fact that it is cited either as authority or with approval in the following subsequent decisions:

Grant v. Phoenix Mutual Life Insurance Company, 121 U. S. 105, 30 L. Ed. 905;

Stanley v. Board of Supervisors of the County of Albany, 121 U. S. 535, 30 L. Ed. 1000;

Bull v. First National Bank of Kasson, 123 U. S. 105; 31 L. Ed. 97;

Bank of Redemption v. Boston, 125 U. S. 60, 31 L. Ed. 689 (693);

Palmer v. McMahon, Receiver of Taxes of City of New York, 133 U. S. 660, 33 L. Ed. 772 (775);

Talbott, admr., v. Silver Bow County Commissioners, 139 U. S. 438, 35 L. Ed. 210 (213);

Pollock v. Farmers Loan & Trust Company, 157 U. S. 427, 39 L. Ed. 759 (820); 158 U. S. 602, 39 L. Ed. 1108 (1135);

First National Bank of Garnett, Kansas, v. Ayers, 160 U. S. 660, 40 L. Ed. 573 (575);

First National Bank of Aberdeen v. County of Chehalis, 166 U. S. 439, 41 L. Ed. 1069 (1076);

First National Bank of Wellington, Ohio, v. Chapman, 173 U. S. 204, 43 L. Ed. 669 (673);

Owensboro National Bank v. Owensboro, 173 U. S. 664, 43 L. Ed. 850 (857);

Plummer v. Coler, 178 U. S. 115, 44 L. Ed. 998 (1101);

Cleveland Trust Company v. Lander, 184 U. S. 112; 46 L. Ed. 456 (458);

Jenkins v. Neff, 186 U. S. 230, 46 L. Ed. 1141;

South Carolina v. United States, 199 U. S. 435, 50 L. Ed. 261 (272);

Clement National Bank v. Vermont, 231 U. S. 118; 58 L. Ed. 147 (155);
New York ex rel. Amoskeag Savings Bank v. Purdy, 231 U. S. 376, 58 L. Ed. 274 (280);
Bank of California v. Richardson, 248 U. S. 475, 63 L. Ed. 372 (375);
Merchants' National Bank of Richmond v. City of Richmond, 256 U. S. 634, 65 L. Ed. 1135 (1138);
Des Moines National Bank v. Fairweather, 263 U. S. 102, 68 L. Ed. 191 (195, 200);
First National Bank v. Anderson, 70 L. Ed. 295 (303), 269 U. S. 339.

In *Adams v. Nashville, 95 U. S. 19, 24 L. Ed. 369,* Mr. Justice Hunt as the organ of this Court affirmed the judgment of the Supreme Court of Tennessee holding a tax on national bank shares valid, although other forms of moneyed capital in the state were unquestionably exempted from taxation; and in the course of the opinion quoted from the prior decision of the Court as follows:

> "By a statute of Pennsylvania, it was enacted that 'all mortgages, judgments, recognizances and moneys owing upon articles of agreement for the sale of real estate shall be exempted from taxation, except for state purposes'. There, as here, it was objected that this exemption, by relieving certain specified property from taxation, brought the case within the prohibition of the Act of Congress, and thus vitiated the tax sought to be enforced. This court held otherwise.
>
> "The Act of Congress was not intended to curtail the state power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. **It was not intended to cut off the power to exempt particular kinds of property, if the Legislature chose to do so."**

In the case of *Davenport National Bank v. Board of Equalization of Davenport, 123 U. S. 83, 31 L. Ed. 94*, the syllabus of the case, which correctly states what was held in it, reads:

> "1. The Act of Congress does not require a perfect equality of taxation between state and national banks, but only that the shares of the national bank shall not be taxed at a higher rate than other moneyed capital in the hands of individuals.
>
> 2. It is only necessary that the system of state taxation of its own citizens, of its own banks and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks. Within these limits, the manner of assessing and collecting all taxes by the State is uncontrolled by the Act of Congress.
>
> 3. While deposits in savings banks constitute moneyed capital in the hands of individuals, yet they are not within the meaning of the Act of Congress in such a sense as to require that because they are exempted from taxation, the shares of stock in national banks must also be exempted."

In the *Bank of Redemption v. Boston, 125 U. S. 60, 31 L. Ed. 693*, this Court again had occasion to enunciate the doctrine that the restriction upon the taxation of national banks set forth in Section 5219 of the Revised Statutes was not intended to interfere with the right of the state reasonably exercised as a matter of its public policy to exempt partially or totally from taxation institutions which it considered were entitled to such exemption, even though such institutions might employ capital in actual competition with national banks. We reproduce that part of the decision which is pertinent here:

> "The particular in which the plaintiff in error chiefly insists that the tax imposed upon its

shares is at a greater rate than that assessed upon other moneyed capital in the hands of individual citizens of Massachusetts, is the alleged inequality existing in favor of that imposed upon savings banks. The contrast of which this inequality is the result is stated to be as follows; viz., that in 1885 a tax of $1,564,995 was collected upon national bank shares in Massachusetts of the value of $113,-000,000, while upon $163,000,000 of savings bank deposits in the same year there was collected as a tax only $815,930.

"In the former case deposits in savings banks in the State of New York to the amount of $437,-107,501, with an accumulated surplus in addition of $68,669,001, were exempted by the laws of the State from all taxation, neither the bank itself nor the individual depositor being taxed on account thereof. It was said in that case, p. 161 (903): 'However much, therefore, may be the amount of moneyed capital in the hands of individuals in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens, **otherwise subject to taxation.**'

"It is impossible, in our judgment, to distinguish the present from the case of the New York savings banks, or of those of Iowa considered in the case of the Davenport Bank. The principal distinction, indeed, between the case of the New York savings banks and those of Massachusetts, involved in the present inquiry, is that the latter pay a tax of one half of one per cent on the amount of their deposits, while the New York banks were exempt from all taxation whatever.

"The argument on behalf of the plaintiff in error, indeed, seeks to establish another distinction.

It is alleged that in Massachusetts savings banks are permitted to transact a banking business in the way of loans upon personal securities, which assimilates them more closely to national banks, and takes away the reason for the application of the rule to them which was applied to the case of the savings banks of New York. But the difference mentioned, if it exists at all, is immaterial; the main purpose and chief object of savings banks, as organized under the laws of Massachusetts, are the same as those in New York, as considered in the case of the Mercantile Bank. **They are substantially institutions under public management, in pursuance of a great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and not as banking institutions in the commercial sense of that phrase. We adhere to the rule as declared in the cases heretofore decided, which forecloses further discussion as to the present point in this case."**

To the same effect is the decision in *Palmer v. McMahon, 133 U. S. 660, 33 L. Ed. 772*, in which it was held that:

"Because a state statute does not provide for the taxation of shares in corporations other than banks, it does not follow that the shareholders in national banks are discriminated against.

"The mode of taxation adopted by the State of New York in reference to its corporations, excluding trust companies and savings banks, does not operate in such a way as to make the tax assessed upon shares of national banks at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens."

(Pars. 4 and 5 of syllabus).

The decision in the case of *First National Bank v. Chapman, 173 U. S. 213, 43 L. Ed. 673*, is directly apposite here. In the cited case the complaint was that national banks were discriminated against in favor of unincorporated banks and private banks and that owners of what was termed "credits" under the law of Ohio were permitted to deduct certain debts from their property returns, whereas no such right was given to the holders of shares of national banks. In holding the state law valid, Mr. Justice Peckham said in part:

> "The main purpose of Congress in fixing limits to state taxation on investments in national banks was to render it impossible for the state in levying such a tax to create and fix an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the Act of Congress is to be read in the light of this policy. **'Moneyed capital' does not mean all capital the value of which is measured in terms of money**; neither does it necessarily include all forms of investments in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations are represented by certificates showing that the owner is entitled to an interest expressed in money value in the entire capital and property of the corporation; but the property of the corporation which constitutes this invested capital may consist mainly of real and personal property, which, in the hands of individuals, none would think of calling moneyed capital; and its business may not consist in any kind of dealing in money or commercial representatives of money. This statement is taken from Mercantile Bank v. New York, 121 U. S. 138, 155 (30:895, 901). That case has been cited with ap-

proval many times, especially in First National Bank of Garnett v. Ayres, 160 U. S. (40:573), and in Aberdeen Bank v. Chehalis County, 166 U. S. 400 (41:1069).

The result seems to be that the term 'moneyed capital' as used in the Federal statute does not include capital which does not come into competition with the business of national banks, and that exemptions from taxation, however large, such as deposits in savings banks or of moneys belonging to charitable institutions, which are exempted for reasons of public policy, and not as an unfriendly discrimination as against investments in national bank shares, cannot be regarded as forbidden by the Federal statute."

It is plain from the testimony in these cases that the two building associations which the plaintiffs characterize as being their competitors are exactly the type of mutual institution that it is the avowed public policy of the State of Louisiana to encourage and foster; so that even if the Court should accept the view of the plaintiffs as to the competitive character of the business carried on by these building associations, nevertheless the tax favoritism shown to them would not constitute a violation of the condition under which the taxation of the plaintiff banks by the State of Louisiana is permitted. *(R. 217 to 249, inc.)*

In the very recent case of *Hoenig v. Huntington National Bank of Columbus, 59 Fed. (2) 479* (certiorari denied October 17, 1932), the Circuit Court of Appeals for the Sixth Circuit, in a particularly able opinion, decided against the contention of the petitioners there, who presented a case that was much stronger in their favor than

has been presented by the petitioners here, the very question with which we are here concerned. In the *Hoenig* case it was urged by the plaintiffs that U. S. R. S. 5219 was violated by tax discrimination in favor of building and loan associations and finance and mortgage companies; and after stating the character of the business done by building associations in Ohio said:

> "National banks perhaps might, but as a matter of fact do not, and in the interest of good banking should not, invest their funds generally in this manner. The two types of institutions have essentially different characteristics; the one is purely commercial in character, in which the assets must be kept liquid; the other is sui generis, noncommercial, and without a comparable need for liquid assets. The one is founded and conducted upon banking principles; the other was created in answer to a need which the banks could not and did not satisfy, and in furtherance of a wholesome public policy to promote building, especially the building of homes, and to develop the habit of thrift.
>
> It is quite true that national banks, subject to certain restrictions, are now permitted to loan money upon the security of real estate mortgages, and that the plaintiffs below had taken advantage of this privilege. It is also true that building associations have invested some of their funds in Liberty bonds, and, to a very limited extent, may have made a few investments of idle capital in collateral loans or so-called 'straight' mortgages. But we cannot concede that even as to these investments the building associations are in substantial competition with national banks, or that, as claimed by plaintiffs below, the mere facts that money is loaned by building associations upon promissory notes, at interest and to be repaid in money, and that national banks take the ownership of real

estate into consideration in passing upon the credit standing of borrowers, necessarily bring the two classes of institutions into competition. In the broad economic sense this may be so, but it was equally so when People of State of New York v. Commissioners, Mercantile Nat. Bank v. New York, First National Bank of Wellington v. Chapman, and Mercantile National Bank v. Hubbard (Lander v. Mercantile Nat. Bank) were decided. In those cases the fundamental and substantial differences between commercial institutions, such as national banks, and institutions of the insurance company, savings bank, and building association types, were the real bases of the finding of want of competition; and our decision of the present issue is founded upon a recognition of these same differences. Compare, also, Georgetown National Bank v. McFarland, 273 U.S. 568, 47 S. Ct. 467, 7 L. Ed. 779.

The scheme of taxation as it existed in Ohio in 1926 and 1927 (it has now been supplanted by an entirely different system) was fair to national banks and did not discriminate, in any broad conception of its application, in favor of other moneyed capital coming into direct competition with the business of such banks; and we do not think that a possible specific exception or two, in obvious departure from the accepted and general rule governing the business of the building associations, should be held to nullify the clear intent of Congress, that national banks should bear their fair proportion of the tax burden, or to effect a virtual exemption of all national banks from taxation. Compare Amoskeag Savings Bank v. Purdy, 231 U.S. 373, 34 S. Ct. 114, 58 L. Ed. 274. We do not feel that the authority of the earlier cases above cited has been weakened by those later decisions invalidating taxes levied upon national banks at different and actually higher rates than those imposed upon all other moneyed capital admittedly in competition with the banks; or that different rules have been adopted by the Supreme

Court for determining what constitutes substantial competition by the cases of First National Bank v. Anderson, supra; First National Bank v. Hartford, supra; Minnesota v. First National Bank, supra; and Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 52 S. Ct. 133, 76 L. Ed. 265.

As to the alleged 'competition for deposits', it is evident from the universal expressions of opinion by the Supreme Court that competition, in the sense intended, is limited to the employment of moneyed capital 'substantially as in the loan and investment features of banking.' Deposits constitute moneyed capital, but national banks are not taxed upon their deposits any more than are savings banks and building associations; and we are here primarily concerned only with what is done with such moneyed capital after it is secured, not with competition to obtain it. There is clearly no distinction in law between the competition for deposits as between national banks and savings banks, and the same competition as between national banks and building associations. Thus Mercantile Nat. Bank v. New York, supra, seems directly in point on this issue."

We note that a considerable portion of the brief filed in this Court for petitioners is devoted to the discussion of questions of fact. Since there is no contention that the findings of fact of the Supreme Court of Louisiana were without any basis at all upon which to rest or that these findings of fact are so interwoven with questions of law involved as to be inseparable and to require this Court to re-examine the evidence and ascertain the facts for itself, we have assumed that this Court would not go behind the opinion of the Supreme Court of Louisiana as relates to the facts in this case but would decide the questions of law presented on the basis of the findings of fact of the

state court. The established principle that ordinarily this Court will not pass upon questions of fact but will accept the findings of the lower court is particularly applicable to decisions of the Supreme Court of Louisiana, which under the Constitution and laws of the state is the ultimate fact finding body in the cases which it decides, it being required to examine the evidence in each case and to determine the facts for itself without regard to the findings of the courts of original jurisdiction.

Art. 7, Section 9, Constitution of Louisiana for 1921.

> "In all civil and probate cases where the Supreme Court is given appellate jurisdiction, the appeal shall be both upon the law and the facts."

Article 905, La. C.P.:

> "When the Supreme Court reverses the judgment of an inferior court, it shall pronounce on the case the judgment which the lower court should have rendered, if it be in possession of all the facts and testimony to enable it to pronounce definitively."

That a distinction due to the difference in practice should be drawn between the decisions of the Supreme Court of Louisiana and those of the courts of last resort of other states has long been recognized by this Court.

In *Crescent City Live-Stock Landing etc, Co. v. Butchers' Union etc. Co., 120 U.S. 141, 30 L. Ed. 614 (616)*, in which a writ of error had been taken from the judgment of the Supreme Court of Louisiana, which had considered on appeal a case tried before a jury in the lower court, the plaintiff in error had based its argument in part upon the erroneous character of some of the pro-

ceedings in the lower court in certain respects. The defendant in error contended that since the Supreme Court of Louisiana was required then, as it is now, to review both the facts and the law, the Supreme Court of the United States should ignore the proceedings in the lower court and should not go back of the opinion of the Supreme Court of Louisiana in order to determine whether or not error was committed by that court. This latter position was approved by the Supreme Court of the United States:

> "It is contended by counsel for the defendant in error that, in examining the record in this case, this court will only consider the opinion and judgment of the Supreme Court of Louisiana in order to ascertain if the authority relied upon by the plaintiff in error was wrongfully disregarded by that tribunal, and that without reference to the rulings of the inferior court, the opinion of the Supreme Court being made a part of the record by law for that purpose. Such appears to be the law of Louisiana as recognized by the decisions of this court. Code, Prac. La. art. 905; Parks v. Turner, 53 U.S. 12 How. 43 (13;885); Hennen Dig. p. 92, No. 3; Cousin v. Blanc's Exrs. 60 U.S. 19 How. 202 15: 601); Grand Gulf R.R. & Banking Co. v. Marshall, 53 U.S. 12 How. 165 (13:938); Murdock v. Memphis, 87 U.S. 20 Wall. 634 (22:443); Crossley v. New Orleans, 108 U.S. 105 (27:667).
>
> "It must therefore be conceded that the sole question to be determined is, Did the Supreme Court of Louisiana, in deciding against the plaintiffs in error, give proper effect to the decree of the Circuit Court of the United States, subsequently reversed by this court?"

See also:

New Orleans Waterworks v. Louisiana Sugar Refining Co., 125 U.S. 18, 31 L. Ed. 611.

In *Egan v. Hart, 165 U.S. 189; 41 L. Ed. 681*, in which Mr. Justice White was the organ of the Court, the opinion reads in part as follows:

> "The record before us contains all the testimony introduced and evidence offered in the trial court, **all of which was open for consideration and passed upon by the supreme court of the state of Louisiana. On error, however, to a state court, this court cannot re-examine the evidence, and, when the facts are found below, is concluded by such finding.** Dower v. Richards, 151 U.S. 658 (34: 305); Bartlett v. Lockwood, 160 U.S. 368 (40: 460): Stanley v. Schwalby, 162 U.S. 278 (40: 968). True it is that in Dower v. Richards the court, referring to the dictum in Republican River Bridge Co. v. Kansas P.R. Co. 92 U.S. 315, 317 (23: 515, 516), treated as open for further consideration the question whether in chancery cases the power existed in this court to review the decision of state courts on both the law and the fact. We, however, conclude that not only the very nature of the writ of error, but also the rulings of this court from the beginning, make it clear that on error to a state court in a chancery case, as in a case at law, when the facts are found by the court below, this court is concluded by such findings. The adjudications are collected very fully in Dower v. Richards, and in the subsequent cases above referred to.
>
> It is likewise settled that on error to the supreme court of Louisiana the opinion of that court is to be treated as part of the record, and that it may be examined in order to ascertain the questions presented, and this court may for the purpose, not of deciding the facts, but by way of throwing light on the findings, look into the entire record. Crossley v. New Orleans, 108 U.S. 105 (27: 667) Gross v. United States Mortg. Co. 108 U.S. 477 (27: 795)."

The cases in which this Court has departed from its practice of refusing to review decisions upon questions of fact were exhaustively reviewed and discussed in the opinion of this Court rendered by Mr. Justice Van Dervanter in the case of *Kansas City Southern Railway Company v. Albers Commission Company, 223 U.S. 573, 56 L. Ed. 556*, which is practically a brief on the subject in itself.

Since the decision in the *Albers* case, the decisions of this Court have done no more than affirm and maintain the distinctions there drawn. Thus in *Creswill v. Grand Lodge K. of P., 225 U. S. 246, 56 L. Ed. 1074 (1080)*, this Court, through Mr. Justice White, said:

> "While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact **which it is contended there was no evidence whatever to support,** and the evidence is in the record, the resulting question of law is open for decision; and (b) that where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing upon the Federal question, to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right. Kansas City Southern R. Co. v. C. H. Albers Commission Co., 223 U. S. 573, 591, ante, 556, 565, 32 Sup. Ct. Rep. 316; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 668, ante, 594, 604, 32 Sup. Ct. Rep. 389; Washington ex rel Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, ante, 863, 32 Sup. Ct. Rep. 535. The conten-

> tions here made bring this case under the first category, **since the insistence here is that there was not any evidence** justifying the findings made by the court concerning fraudulent purpose, injury to property, deception of the public, etc."

But it is equally well settled that where the findings of fact made by the state court are supported by evidence and where the state court does not use its findings of fact as a cloak for its decision of a question of law, the Supreme Court of the United States will not review the evidence to determine whether or not the state court was right in finding the facts as it did. An illustration of this is found in the decision in *Northern Pacific Railway Company v. North Dakota ex rel. McCue, 236 U. S. 585, 59 L. Ed. 735 (740)*, in which Mr. Justice Hughes as the organ of the court, said:

> "The facts thus found must be taken to be established. This court will review the finding of facts by a state court (1) where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. Kansas City Southern R. Co. v. C. H. Albers Commission Co., 223 U. S. 573, 591, 56 L. Ed. 556, 565, 32 Sup. Ct. Rep. 316; Creswell v. Grand Lodge K. P., 225 U. S. 246, 261, 56 L. Ed. 1074, 1080, 32 Sup. Ct. Rep. 822; Wood v. Chesborough, 228 U. S. 672, 678, 57 L. Ed. 1018, 1021, 33 Sup. Ct. Rep. 706. But the present case is not within either branch of the rule. Portland R. Light & P. Co. v. Railroad Commission, 229 U. S. 397, 412, 57 L. Ed. 1248, 1258, 33 Sup. Ct. Rep.

820; Miedreich v. Laucenstein, 232 U. S. 236, 243, 244, 58 L. Ed. 584, 589, 590, 34 Sup. Ct. Rep. 309. It cannot be said that the findings of fact made by the state court are unsupported by evidence, and it is apparent that the substantial question raised by the assignments of error and submitted in argument arises upon the facts found."

In the present case, as we have heretofore pointed out, the existence of ample evidence to sustain the findings of fact of the Supreme Court of Louisiana cannot reasonably be denied; and it is equally plain that the findings of fact of the Supreme Court of Louisiana was the sole basis for its decision of the case against petitioners, the law being regarded by it as well settled by the many decisions of this Court which it quoted and followed.

These findings of fact on the part of the Supreme Court of Louisiana are, we submit, sufficient to dispose of the case here, for upon a consideration of the evidence as a whole that court held that:

(a) Not only as a matter of theory but as a matter of fact the tax burden laid upon the shareholders of national banks in Louisiana is no more than fairly equal to the tax burden laid upon all other classes of monied capital in the hands of individual citizens of the state, whether or not such monied capital comes into competition with the business of national banks, with the exception of certain classes of institutions which the state has favored in the matter of taxation for reasons of public policy;

(b) The evidence here discloses that the plaintiffs are not really concerned with the tax exemptions com-

plained of because of the lack of bearing of such tax exemptions upon the business of the plaintiffs **due to the fact that the tax exemptions of which plaintiffs complain relate to capital used in such a way as not to bring it in competition with their business as actually carried on by them;**

(c) The tax favoritism alleged to have been shown in the administration of the tax laws to individuals, small loan companies, automobile finance companies, life insurance companies, etc., even if it had been shown to exist, **was not prejudicial to the petitioners because of the absence of competition between the petitioners and the other taxpayers whom they claim were thus favored.** (Opinion of the Supreme Court of Louisiana, R. 664 et seq.)

Were it not for the great importance of this case to the State of Louisiana and all of its political subdivisions we would rest our argument at this point, since we believe that the findings of fact of the Supreme Court of Louisiana will be respected by this Court and that this Court will decide only the points of law involved in connection with those findings; but since the learned counsel for petitioners take a different view of the matter and have reviewed the evidence in the case at some length in their brief, we do not feel justified in taking any chances in the matter and will follow their example.

We submit that a review of the whole evidence in this case shows beyond reasonable doubt that the monied capital which petitioners claim is favored to their prejudice is not used in substantial competition with their capital.

That the discrimination in order to be material must be in favor of monied capital which is directly and substantially in competition with that invested in the complaining banks, in our opinion, admits of no doubt.

Mercantile National Bank v. N. Y., 121 U. S. 138; 30 L. Ed. 895;

Palmer v. McMahon, 133 U. S. 660; 33 L.Ed. 772;

First National Bank v. Chehalis County, 166 U. S. 440; 41 L. Ed. 1069;

National Bank of Commerce v. Seattle, 166 U. S. 463; 41 L. Ed. 1079;

First National Bank v. Chapman, 173 U. S. 205; 43 L. Ed. 669;

Georgetown National Bank v. McFarland, 273 U. S. 568; 71 L. Ed. 779.

The petitioners, however, have taken the position that the untaxed competition against which Congress sought in Section 5219 of the Revised Statutes to protect national banks is not only capital used in substantial competition with the business **actually** carried on by the banks but capital employed in one or more of the activities **open** to national banks. This position was approved by the district judge and was in fact, as he himself said in his written opinion *(R. 86)*, a vital question and one upon which he in fact hinged his decision of these cases in favor of petitioners.

On this point the Supreme Court of Louisiana held that the district court erred; for to hold that it was the intention of Congress to impose upon the states as a condition precedent to the taxation of national banks a requirement to tax all capital used in activities in which a national bank **might lawfully engage,** whether or not national banks in the state **actually did engage** in such activities, is to assume that Congress intended to deal with theories and possibilities rather than facts and actualities and that Congress had in mind not merely the protection of the national banks against favoritism on the part of the state in favor of actual competing capital but to prohibit the state by means of tax exemptions or tax favoritism from bringing about the employment of capital in those fields open to but not occupied by the national banks in the state. We cannot conceive that Congress ever intended such a thing. What is was undoubtedly trying to accomplish was the placing of national banks on a basis of equality with actual competitors in the matter of state and local taxation; and in no case decided by this Court

have we been able to find any holding to the contrary. It cannot be that Congress intended to assume a "dog in the manger" attitude towards the states in the matter of real estate loans for instance, and to say to those states in substance that although the national banks might not desire or accept real estate long term loans, nevertheless the states might not lawfully encourage others to make such loans by tax concessions or tax exemptions.

The case here presented is, we think, well within the long established rule that one who invokes the protection of a provision of the Constitution of the United States, in order to escape the burden of state taxation laid on him by a statute which he contends contravenes such constitutional provision, must show not merely that the operation of the statute generally **may** result in a conflict with the constitutional provision relied upon, but that the operation of the state law which he attacks **as applied to his particular case** produces a result forbidden by the Federal Constitution. Thus a state taxing statute may impose an unequal burden upon classes of taxpayers between whom no substantial and real distinction exists; yet it is well settled that that class of taxpayers which is least burdened by the statute may not question the constitutionality of the statute on the ground that the burdens laid upon others by the statute amount to a denial of the equal protection of the laws, although if the same question were raised by another class of taxpayers, the statute might be held void.

Similarly, in these cases the plaintiff banks, upon whom rests the burden of proving—**not partially but entirely**—that either the intended or the practical effect of the state taxing laws is to injure them by taxing them at

a rate greater than other capital in competition with their business is taxed, must allege and prove that the competition is not imaginary but real, not potential but actual, not merely possible but existing. It is not, we submit, sufficient for the plaintiffs here to show that the capital of which they complain as being untaxed is employed in one or more of the activities in which Congress has authorized them to engage; for they are obviously not injured by the favoring of capital which is not used in actual competition with their business. **They must show injury to their business rights from tax favoritism towards capital which is actually in competition with their capital before they can secure the annulment of the taxing laws of the state as applied to them. The injury must be to their business as it is actually conducted, not as it might be conducted.**

The correctness of the principle we have stated is conclusively demonstrated by a reference to decisions of this Court in cases where state statutes have been attacked as void because of conflict with provisions of the Federal Constitution by plaintiffs who, while affected by the operation of the statutes, have not themselves been actually discriminated against as a result of the operation of such portions of the statutes attacked as they alleged to be unconstitutional.

Thus in the recent case of *Roberts & Schaefer Co. v. Emmerson, 271 U. S. 48; 70 L. Ed. 827*, a statute of Illinois levying an annual franchise tax on corporations was attacked as denying the equal protection of the laws and as impairing the obligation of the contract chiefly because the tax was based upon the amount of authorized capital

stock rather than upon the amount actually issued and paid for; it being contended that as to corporations only a small part of the authorized capital stock of which had been subscribed and paid for the taxing statute was grossly unfair in that it imposed upon such corporations a burden wholly disproportionate to that imposed upon other corporations having a smaller authorized capital stock but with the same amount of capital actually invested in them. All of the authorized capital stock of the plaintiff, however, had been issued; and this Court held that whether or not the statute might be in conflict with constitutional provisions when applied to the case of a corporation all of the capital stock of which had not been issued, the plaintiff was in no position to raise the question; and the judgment of the Supreme Court of Illinois upholding the validity of the tax was affirmed.

We quote that part of the opinion which is pertinent here:

> "But the plaintiff is not in a position to raise this question. As this court has often held, one who challenges the validity of state taxation on the ground that it violates the equal protection clause, cannot rely **on theoretical inequalities, or such as do not affect him, but must show that he is himself affected unfavorably by the discrimination of which he complains.** See Western U. Teleg. Co. v. Atty. Gen., 125 U. S. 530, 552, 553, 31 L. ed. 790, 794, 8 Sup. Ct. Rep. 961; Gast Realty & Invest. Co. v. Schneider Granite Co., 240 U. S. 55, 60, 60 L. ed. 523, 526, 36 Sup. Ct. Rep. 254; Whitnell v. Ruecking Constr. Co., 249 U. S. 63, 63 L. ed. 479, 39 Sup. Ct. Rep. 200; Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 121, 65 L. ed. 165, 169, 41 Sup. Rep. 45. The plaintiff cannot complain that the

tax is measured by authorized, instead of issued, capital stock, because all of its authorized capital stock has been issued. Any discrimination that exists operates, therefore, in plaintiff's favor."

In *Board of Supervisors v. Stanley, 105 U. S. 305; 26 L. Ed., 1044,* this Court considered objections to the taxing of shares of a national bank based chiefly upon the ground that certain deductions were allowed shareholders in state banks and other state corporations which were not permitted to shareholders of national banks under the taxing statute. It was not, however, shown that the plaintiff would have been entitled to the deductions even as a shareholder in a state corporation, so that as applied to him it could not be said that the taxing statute, however void it might have been as to persons differently situated, made any distinction between his rights as a shareholder in a national bank and the rights of others as shareholders in state corporations.

The decision of the Court was rendered by Mr. Justice Miller; and in the course of the opinion it was said:

"Accepting, therefore, as we must, the Act of 1866, as construed by the Court of Appeals of New York, as not authorizing any deductions for debts by a shareholder of a national bank, is it for that reason absolutely void? This cannot be true in its full sense, for there is no reason why it should not remain the law as to banks or banking associations organized under the laws of the State, or as to private bankers, of which there no doubt exists a large number of both classes.

"What is there to render it void as to a shareholder in a national bank, who owes no debts which he cannot deduct from the assessed value of

his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave him the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction. What legal interest has he in a question which only affects others? Why should he invoke the protection of the Act of Congress in a case where he has no rights to protect? Are courts to sit and decide abstract questions of law in which the parties before the court show no interest and which, if decided either way, affects no right of theirs?

"It would seem that if the Act remains a valid rule of assessment for shares of state banks, and for individual bankers, it should also remain the rule for shareholders of national banks who have no debts to deduct, and who could not, therefore, deduct anything if the statutes conformed to the requirements of the Act of Congress.

"It is very difficult to conceive why the Act of the Legislature should be held void any further than when it affects some right conferred by the Act of Congress. If no such right exists, the delicate duty of declaring by this court that an Act of state legislation is void, is an assumption of authority uncalled for by the merits of the case, and unnecessary to the assertion of the rights of any party to the suit."

(P. 1050).

"But in a review of the cases in this court on this subject, that of Austin v. The Aldermen of Boston (74 U S. XIX, 224), will be found most nearly to resemble the one before us. It related to the same matter of the invalidity of a statute of a State taxing shares of the national banks as being in conflict with the Act of Congress. That Act said that such taxes might be assessed at the place where said bank was located and not elsewhere.

"The Act of the Massachusetts Legislature directed the assessment and taxation of the shares at the place where the owner resided. The plaintiff in error, Austin, having contested the tax on his shares in the courts of the State unsuccessfully brought the case here by writ of error. This court declined to enter upon the question of the validity of the Massachusetts Statute, because the case did not show that Mr. Austin was taxed on his shares in any other place than Boston, the place where the bank was located.

"The argument of counsel in the case before us is, that any tax or a tax on any person on account of his bank shares, is void because the whole of the New York Statute is void. If the argument is sound, it was equally applicable to Austin's case.

"The Statutes of Massachusetts, which made no limitation of taxation to the place where the bank was located, must be held void under any principle which would wholly invalidate the Statute of New York, because it did not allow the deduction of the owner's indebtedness from his shares. And if the Massachusetts Statute was utterly void as to national bank shares, then the tax on Mr. Austin's shares in Boston was void, and he had a right to be protected against the unconstitutional statute. **The court evidently went upon the principle that the statute was only void as against the Act of Congress, in cases where some one was injured by the particular matter in which there was such conflict. The cases seems to us directly in point.**

"To the same effect are the cases of People v. Cassity, 46 N. Y. 46; Gordon v. Cornes, 47 N. Y. 608; Village of Middleton, ex parte, 82 N. Y. 196."

The case of *Citizens National Bank v. Kentucky, 217 U. S. 443; 54 L. Ed. 832,* likewise involved the question of the validity of state taxation of shares of stock of

a national bank. The statute attacked was the law of Kentucky authorizing the back assessment of shares of stock in the Citizens National Bank and other national banks as property omitted from the tax list. As applied to stock owned by nonresident shareholders the decision in a prior case *(Covington v. First National Bank, 198 U. S., 100; 49 L. Ed. 963)*, had held the statute to be discriminatory and void. In the *Citizens National Bank* case, however, the liability sought to be avoided was in behalf only of resident stockholders; and although the same act under which the taxes were levied had been held void in the *Covington* case, it was held in the *Citizens National Bank* case that the question of the invalidity of the taxing statute could be raised only by a nonresident stockholder and that since in the *Citizens National Bank* case no nonresident stockholder had been assessed, the Court would not consider the question of the validity or invalidity of the statute on the ground of its discrimination against others than the plaintiff in the suit itself.

In *Keeney v. Comptroller of the State of New York, 222 U. S. 522; 56 L. Ed., 299*, it was held that children of a grantor were not in position to attack as discriminatory a New York Statute imposing a tax on transfers to take effect upon the death of the testator, which tax was graduated, since the plaintiffs fell into that classification which was assessed at the lowest rate and were therefore without interest to assert that as to others the provisions of the statute were unfair and unequal.

The parallel between these cases and the cases at bar is close and plain, for just as in the present case it

must, we think, be held that the capital a preference in favor of which as against that invested in national banks is forbidden by Section 5219 of the United States Revised Statutes must be capital that is actually employed in competition with the business of the plaintiff banks who are here asserting that the failure to tax such capital has restricted and crippled their ability to meet its competition, so in the cited cases it was held that the discrimination which a litigant may complain of as violating constitutional requirements must be a discrimination which actually works a hardship upon the litigant himself and that if such is not the case a state statute will not be held unconstitutional because either its purpose or effect may be to discriminate against someone else.

In *Darnell v. Indiana, 226 U. S. 388; 57 L. Ed. 267,* the statute of Indiana was assailed which proposed to tax all shares in foreign corporations except national banks owned by residents of the state. It was recognized by this Court that if applied to certain classes of stockholders, the statute might be open to constitutional objections, but the court declined to go into that phase of the case, because the plaintiffs did not show that they were within the class or classes discriminated against.

In a sense, the plaintiffs in all of the cases cited were injured by the operation of the unconstitutional statutes for the reason that they were required to make payments of taxes which they would have escaped if the statutes had been held void. So, in a limited sense, it might

have been urged and was on several occasions urged that the plaintiffs did have an interest in attacking the statute just as it might be urged in the present case that plaintiffs have an interest in that they want to escape being taxed at all, whether or not the provisions and operation of the taxing laws do in fact discriminate against them by favoring capital that comes into competition with them.

We have not, however, been able to find any case in which an interest of this remote character was held to be sufficient for the maintenance of an action to invalidate the statute.

In *Darnell v. Indiana*, Mr. Justice Holmes, as the organ of the Court, said in part:

> "The most serious aspect of this objection is that the statutes of Indiana do not make allowance if a foreign corporation has property taxed within the state. But, as to this, it is enough to say that, however the statutes may be construed in a case of that sort, the plaintiffs in error do not show that it is theirs, and that, as they do not belong to the class for whose sake the constitutional protection would be given, if it would, they cannot complain on that ground. Smiley v. Kansas, 196 U. S. 447, 457; 49 L. Ed. 546, 551; 25 Sup. Ct. Rep. 289; New York ex rel Hatch v. Reardon, 204 U. S. 152, 160, 51 L. Ed. 415, 422; 27 Sup. Ct. Rep. 188; 9 Ann. Cas. 736."

In *Straus v. Foxworth, 231 U. S., 162; 58 L. Ed., 168;* it was held with reference to the right of a plaintiff to attack a territorial taxing statute that his standing would depend not upon what might be done under the stat-

ute but what was actually done and not upon a possible injury to him but an actual and existing one.

Mr. Justice Van Devanter was the organ of the Court in the *Straus* case; and we reproduce that part of the opinion pertinent here:

> "It is contended, however, that the remedial or relieving provision is so broad in its terms as to give effect to a sale not founded upon a prior assessment, or where no opportunity was afforded for a hearing in opposition to the tax, and therefore that it is violative of due process. To this it is a sufficient answer to repeat what was said in Castillo v. McConnico, 168 U. S. 680, 42 L. Ed. 624, 18 Sup. Ct. Rep. 229, in disposing of a like contention: 'But as thus stated, the proposition presents a purely moot question. The plaintiff in error has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether, in the case which he presents, the effect of applying the statute is to deprive him of his property without due process of law.'"

In a subsequent case, *Pullman Company v. Knott, 235 U. S. 23; 59 L. Ed., 110*, Mr. Justice Holmes, in an even more pointed manner, directed attention to the fact that constitutional objections to statutes will be considered by the Supreme Court of the United States only in cases where the person objecting shows that the effect of this statute is to work upon him the very injustice or injury which the constitution prohibits, just as in the present case shareholders of national banks seeking to avoid state taxation on the ground that their capital as invested in the national banks is discriminated against in favor of other capital invested in competing institutions or activities

must show such competition to be real, not theoretical and potential.

> "We will deal with the Federal question first. It is suggested that there is an arbitrary classification because the tax is confined to sleeping and parlor car companies, and does not fall upon railroads operating their own sleeping and parlor cars. If otherwise this were a valid objection, as to which we need express no opinion, it is enough to say that a tax is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are. Keokee Consol. Coke Co. v. Taylor, 234 U. S., 244, 58 L. Ed., 1288; 34 Sup. Ct. Rep. 856. It does not appear that any railroad in Florida does operate its own sleeping or parlor cars, and the attorney general of the state denies that such a case exists."

Similarly, in the case of *Oliver Iron Mining Co. v. Lord, 262 U. S., 176; 67 L. Ed., 935,* Mr. Justice Van Devanter, as the organ of a unanimous court, in considering the validity of a Minnesota taxing act which levied a tax upon the business of mining or producing iron ore in the state said:

> "Among the deductions which the act provides shall be made from the value of the ore before computing the tax is 'the amount of royalties paid on the ore mined and produced during the year.' This provision is assailed as working a serious discrimination in favor of those who operate under leases and pay royalties, as all the lessees do, and against owners who operate their own mines and pay no royalties. The question is an important one and has not been before the Supreme Court of the state. It apparently requires a construction of the particular provision along with other parts of the act, and possibly of the state constitutional pro-

vision. After that it may be that there would be need for turning to the 14th Amendment. **'Only those whose rights are directly affected can properly question the constitutionality of a state statute and invoke our jurisdiction in respect thereto.'** Hendrick v. Maryland, 235 U. S. 610, 621; 59 L. Ed., 385, 390; 35 Sup. Ct. Rep. 140; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 160; 51 L. Ed., 415, 422; 27 Sup. Ct. Rep. 188; 9 Ann. Cas. 736; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, 58 L. Ed., 713, 719; 34 Sup. Ct. Rep. 359. The record shows that of the many iron mines in the state, all but six are operated under leases, and that none of the six was operated in any way during 1921, the year in respect of which the tax was about to be imposed when these suits were begun. Therefore, no tax could be imposed in respect of the six mines, based on that year's operations, and it is made plain that the defendants have no purpose to impose one. **It cannot be merely assumed that mining has been resumed at those mines, nor that any tax in respect of them for later years is now threatened.** The situation in these cases is therefore such that none of the plaintiffs is entitled to invoke a decision of the question. We accordingly leave it entirely open."

The contention of the plaintiffs and the conclusion of the district judge in opposition to the decisions we have quoted rested upon the decision of the New York Court of Appeals in the case of *People v. Goldfogle, 242 N. Y. 277, 151 N. E. 452*, which case, as we read it, is not relevant here. Without reviewing the facts in that case, we refer Your Honors to the discussion of it in the opinion of the Supreme Court of Louisiana. *(R. 677-678).*

If it were true, as contended by the plaintiffs and as found by the District Judge, that what Congress meant

to forbid was tax favoritism on the part of the states to all capital employed in a manner open to national banks rather than to that employed in actual competition with the business of the national banks in such states, then this Court has wasted a great deal of its time in determining in various cases the existence or nonexistence of actual substantial competition between the banks and the other capital alleged to be favored. Its decisions have been based not only on how allegedly competing capital was employed but also on how the plaintiff bank in each case employed its own capital. Obviously, if the District Judge is right on this point, no question of fact as to the activities of national banks in particular cases would ever be material; since what a national bank is **permitted** to do is a question of law, not fact.

This Court, however, seems to be under a different impression as to the meaning of Section 5219, for it has repeatedly considered and determined as a question of fact the character and extent of the business actually done by the plaintiff banks in suits similar to this.

Apt illustrations of the importance this Court attaches to the existence of actual rather than theoretical competition in cases arising under Section 5219 is afforded by a consideration of three recent cases.

Thus, in the case of *First National Bank v. Hartford, 273 U. S., 547; 71 L. Ed. 767,* in which the state tax on national bank shares was held to be discriminatory, the decision was expressly bottomed on a finding that

the capital favored under the state law was actually being used in competition with the national banks in the state; and we quote those parts of the decision directly applicable to the point under discussion:

> "It is necessary also to ascertain the precise meaning to be given the statute as applied to the facts in hand in order to determine whether the **particular moneyed capital and the particular competition with which we are here concerned** are moneyed capital and competition within the spirit and purpose of the statute. The question is thus a mixed one of law and fact, and in dealing with it we may review the facts in order correctly to apply the law."
>
> "The evidence shows that **plaintiff** in the course of its business receives deposits, loans money, has a savings department, deals in exchange, buys and sells notes, government and other bonds, discounts commercial paper and **acquires real estate mortgages by loan and purchase.** On trial, plaintiff called numerous witnesses who gave testimony, **uncontradicted by defendant,** tending to show the nature and extent of various classes of moneyed capital in the hands of individuals in the state and the nature of its employment **in competition with the business carried on by national banks.** There are real estate firms engaged in lending money to individuals in the vicinity of plaintiff's banking house, the amount thus loaned amounting annually from $250,000 to $300,000. **According to the testimony, the making of these loans affords the same competition to plaintiff as loans made by banks."**
>
> * * * * * *
>
> "Upon this evidence, the trial court found that during 1921 moneyed capital in the hands of individual citizens in the vicinity of plaintiff's banking house, amounting to many hundreds of thousands of dollars, which was not assessed for taxa-

tion nor taxed, was employed in a manner **which brought it into competition with the business conducted by national banks, including that of plaintiff.** It also found that moneyed capital to the extent of millions of dollars held by individual citizens throughout the state, and employed in a manner which brought it into competition with such banks, was similarly exempt from this taxation."

* * * * * *

"Our conclusion is that paragraph 5219 is violated wherever capital, substantial in amount when compared with the capitalization of national banks, is employed either in a business or by private investors **in the same sort of transactions as those in which national banks engage and in the same locality in which they do business."**

* * * * * *

"Here large amounts of capital are shown to be invested in businesses carried on throughout the state which are of the same character as some though not all of the business carried on by national banks. In two fields at least, loans and sales of credit, capital thus employed is shown to be **in substantial competition with that of national banks.**

"The evidence might have been directed more in detail to the precise character of the competition. But that offered was uncontradicted, and when it was shown that national banks in the state of Wisconsin having a capital and surplus in excess of fifty millions of dollars are engaged in the business of making loans, and that there is an extensive loan business in the state not subjected to the tax burdens of national banks, **and it was testified directly that this business came into competition with the business of plaintiff and other national banks,** we think that the finding of the trial court was supported by the evidence and should not have been disturbed.

> "There was, also, we think, sufficient evidence that private individuals as investors of surplus funds are engaged in loaning money at interest on real estate mortgages and other evidences of indebtedness such as normally enter into the business of banking and that these investments are of substantial amount. We do not conceive that in order to establish the fact of competition it is necessary to show that national banks and competing investors solicit the same customers for the same loans or investments. **It is enough as stated if both engage in seeking and securing in the same locality capital investments of the class now under consideration which are substantial in amount."**

Certainly, if the competition, discrimination in favor of which is forbidden by Section 5219, embraces the employment of capital in any field open to national banks, whether or not that field is actually occupied by the banks, the statement of this Court in the *Hartford* case as to both the banks and the competing capital engaging in seeking and securing capital investments of the same class in the same locality is purely gratuitous, for under such a construction as the plaintiff contends for, the sole inquiry which the Court would make would be as to the character of business done by the capital which is alleged to have been favored under the taxing statutes of the state.

Again, in the case of *Minnesota v. First National Bank, 273 U. S., 562; 71 L. Ed. 775*, the decision in favor of the bank was based upon a finding of the existence of substantial competition on the part of favored capital with the national banks within the state.

Here, again, the language of the opinion shows the importance attached by the Court to the existence of actual competition between the banks and the favored capital.

> "The evidence shows that in Ramsey county there were listed for taxation for 1921 in the hands of individuals, promissory notes amounting to $2,481,446, and bonds, exclusive of tax exempts bonds and real estate mortgages to $7,595,975; for 1922, notes to $1,648,810, bonds to $9,931,955. There was invested in those years in real mortgages in Minnesota over $185,000,000 annually. The investment of national banks in Minnesota in those years in real estate mortgages was in excess of $19,000,000; in United States government bonds in excess of $41,000,000, and in other securities $33,800,000.
>
> * * * * * *
>
> "But it is unnecessary for us to enter upon the field of judicial notice, for it clearly appears from the evidence, as the court below found, that a large proportion of these investments consisted of investments of individuals out of surplus funds which they were investing and reinvesting in bonds, mortgages and other evidences of indebtedness **and that these transactions or continued activities are such as normally constitute an important part of the business of banking as conducted by respondent and other national banks in Minnesota.** There is direct evidence, also, that the investments of individuals in this type of security aggregating large amounts lessens the opportunity for the investment of capital by national banks. The only witness called by petitioner admitted that to some extent such competition existed. In this state of the record we think the findings of the state court are supported by the evidence.
>
> "That capital of individuals thus seeking investment and reinvestment in competition with the

> capital in national banks is money capital coming into competition with the business of national banks within the meaning of paragraph 5219 is the effect of our decision in First National Bank v. Hartford (273 U. S. 548, ante, 767 ..... A.L.R. ..... 47 Sup. Ct. Rep. 462), and other cases there considered."

Immediately following these two decisions is that in the case of *Georgetown National Bank v. McFarland, 273 U.S., 569; 71 L. Ed. 779*, in which the Court sustained a decision of the Court of Appeals of Kentucky holding state taxation of national banks valid on the ground that the capital which was taxed less heavily than that investment in national banks was not employed in actual and direct competition with the banks.

To our mind the decision in the *McFarland* case squarely holds that there must be both allegation and proof of actual competition between the complaining bank itself and the capital which it claims is favored by the state. This is made very clear indeed when the decision of the Kentucky Court of Appeals is read. This decision is reported in *270 S. W., 995*, and shows beyond possible question that the manner in which capital favored under the Kentucky laws was being used at the time was such as to have constituted actual competition with the national banks in the state if such banks had chosen to employ their capital in the same manner. The Kentucky court held, however, that the plaintiff in the *McFarland* case had avoided long time real estate loans just as the plaintiffs in the cases at bar are shown to have been avoiding them; and it was upon the basis of its finding that the plaintiff had not chosen to engage in competition with the other

capital of which it complained that the Kentucky court decided the case; and it was upon this same hypothesis that this Court affirmed the decision.

What is competition?

The Missouri Court of Appeals in the case of *Ferd. Heim Brewing Company v. Belinder, 97 Mo. App. 64, 71 S. W. 691*, has defined "competition" as:

> "The struggle between rivals for the same trade at the same time."

Webster defines "Competition" as:

> "1. Act of seeking, or endeavoring to gain, what another is endeavoring to gain at the same time; common strife for the same object. * * *.
>
> "2. The effort of two or more parties acting independently, to secure the custom of a third party by the offer of the most favorable terms."

Of course, to some extent and in one sense every person or firm or corporation that uses money in the conduct of his or its business at some point in the conduct of that business becomes a competitior of the banks for the capital which he or it employs. This is true because the banks are the depositories of practically all of the capital of the country and at some time or other all of the money in the country, generally speaking, passes into or through their hands.

The incorporation of a lumber company, for instance, may require the withdrawal from a national bank and the payment into the treasury of the lumber company of a large sum of money, which may be immediately in-

vested by the lumber corporation in various properties, so that the net result of the operation has been to take away certain deposits for which the bank naturally competes; yet, we do not believe that it would be seriously urged that the capital invested in the lumber company is moneyed capital in competition with that invested in national banks.

Another familiar illustration of competition between business corporations and the banks is furnished by the sale of stocks and bonds of these corporations by their own organizations. For instance, the Cities Service Companies throughout the United States regularly offer their own stocks and bonds to the public in direct competition with the national banks, which are offering the same stocks and bonds at the same time; yet, it does not follow from that practice that investments in stock of the Cities Service Company are capital which is to be regarded as in substantial competition with that invested in national banks and which may not be favored by the state in comparison with the taxation of stocks in national banks.

We assume that it will be conceded that while a manufacturer who sells only to jobbers and a jobber who sells only to retailers and a retailer who sells only to individuals all may and do handle and sell the same kind and quality of goods at the same time and in the same territory, they are not competitors, as they do not solicit trade from the same people or the same class of people. Similarly, we assume that it will be conceded that there is no actual or substantial competition between a bank which neither desires nor solicits a particular class of loans and individuals and corporations which do solicit and desire

such loans. **Competition is a question of fact and not of theory; and whether or not there was actual and substantial competition between the plaintiff banks in these cases and the individuals and corporations of whom they complain as being taxed less heavily than themselves is a question of fact to be determined from the evidence in these cases.**

Let us, therefore, for a moment consider the character of the business done by these individuals and corporations and the character of the business done by the plaintiff banks and the manner in which each and every one of them functions and the trade each one tries to get, and see whether or not there is in fact any real competition between these individuals and corporations on the one hand and the complaining banks on the other.

Let us begin with the individuals. The evidence for the plaintiffs as to the business done by individuals consists of the admission quoted on page 233 of the Record, which reads as follows:

> "It is admitted by all parties that more than Three Million ($3,000,000.00) Dollars is and was during the year 1930 invested in notes secured by mortgages in Caddo Parish, Louisiana, and its vicinity, by individual citizens who habitually invest **their own funds** in such securities."

That such investments as those admitted to have been made by these individuals are not within the meaning of the terms of the Act of Congress appears to us to be self-evident. The Act itself provides:

> "That bonds, notes, or other evidence of indebtedness in the hands of individual citizens not

employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

As said in *First National Bank v. Anderson, 269 U. S. 350, 70 L. Ed. 304:*

> **"In later cases that definition was accepted and given effect as if written into the restriction. It, of course, would exclude bonds, notes or other evidences of indebtedness when held merely as personal investments by individual citizens not engaged in the banking or investment business, for capital represented by this class of investments is not employed in substantial competition with the business of national banks."**

Certainly it cannot be reasonably deduced from this admission alone that there was any substantial competition between the individual citizens investing their own funds in mortgage notes and the plaintiff banks, who, as we shall later proceed to show, have done everything in their power to avoid this character of investment.

The evidence for the defendants as to the character of business done by these individuals is both positive and convincing on the point. Messrs. Sam Feist, Charles W. Lane, Will North and J. M. Robinson, all of whom customarily lend money on mortgages in Caddo Parish, testified without exception that practically all of the loans made by them are loans upon security of real estate mortgages and are for terms varying from one year to five years and several of them testified of their own knowledge

that such loans are, generally speaking, not desired or made by the national banks.

Thus **Mr. Feist** testified *(R. 259-260)*, with reference to the business both of himself and his father-in-law, Mr. Felix Weiller, as follows:

"Q. What is the general character of loans that you made, that is on what security and for what length of time?

A. Well, on real estate principally in the City of Shreveport.

Q. And for what length of time?

A. Well, from one to five years.

Q. To what extent, if at all, have the national banks in Shrevepuort or any of them sent to you applicants for such loans?

A. Well, I would say to a considerable extent.

Q. Has that been true during 1930?

A. Yes, sir.

Q. That is last year?

A. Yes, sir.

Q. Do you know why they came to you or rather were sent to you instead of the national banks taking the loans?

(MR. WARREN: That is objected to, if the Court pleases, as asking for an opinion on the part of the witness on a matter about which he has not been shown to have any knowledge.

THE COURT: Confine your answer to your own knowledge. Do you know?)

A. Well, I know that the banks don't take these long-time loans.

Q. Has that been a matter of common knowledge in the City of Shreveport?
A. I think it has."

And **Mr. Lane** testified *(R. 261-262-263)* as follows:

"Q. Mr. Lane, do you mind telling how old you are?
A. I am sixty-eight (68) years old.

Q. How many years have you lived and been in Shreveport?
A. In the Parish about fifty years.

Q. Are you connected with any bank in the City of Shreveport?
A. I am a director of the First National Bank.

Q. Have you been engaged any for your own self in making loans on real estate in Caddo Parish?
A. I don't make that a business. Occasionally I buy some first mortgage paper or long-term paper, and I make some loans which are considered desirous loans that the bank would not handle. And I furnish some farmers and planters with money to assist them in making crops on chattel mortgages and on crop liens. That is mighty near the extent of my lending.

Q. Are you sufficiently informed as to the attitude of the national banks in Shreveport in the matter of making real estate loans, that is loans secured solely by real estate, to say whether or not during 1930 the national banks of Shreveport would make such loans?
A. I think I am pretty well informed along that line.

Q. Then please state what the facts are in that regard?
A. The national banks in Shreveport look with disfavor upon making loans upon real estate or all long-time loans, on account of

tying their funds up, as they want to keep their business liquid, their assets liquid at all times, which can only be done by short-term loans. And loans on chattel mortgages and crop liens are not desirable or taken by the banks, as a rule."

And on **cross-examination** he testified:

"Q. They do make loans to planters for the purpose of making crops, do they not?

A. That would be predicated entirely upon the responsibility of the planter himself but not on the crop.

Q. The point I make, Mr. Lane, is, as a matter of fact though, their requirements for collateral and security may differ, but the national banks do finance planters for agricultural purposes?

A. Not as a rule. They do make some loans, but it is not their main business. It is not their main business to make those kind of loans.

Q. Their business is quite variable, is it not?

A. Is what?

Q. Quite variable?

A. Well, it is variable of course, but the fundamental business of a bank is to make commercial loans to responsible parties where the moral responsibility is the first consideration.

Q. And of necessity they must keep the bank in a large measure liquid?

A. Yes.

Q. And for that reason they are necessarily limited in real estate loans as well as in other loans that cannot be repaid promptly. Isn't that correct?

A. Well, the banks do not desire real estate loans for the reason that they want to keep their

business in a liquid condition, and these loans are always offered to private parties on long terms or on from one to five or ten years, which the banks cannot take with any degree of safety for the reason that the values might decline and the banks could not make collections solely on the security that is offered on these long-time loans. They look more to the responsibility of the maker of the note than they do to anything else. They look more to the responsibility of the maker and the endorsers of the note more than they do to the real estate collateral.

Q. Well, isn't that true as to the loans you make also?

A. No, it is not true on loans that individuals make. They generally make their loans on the basis of the value of the property that they have a mortgage on. It differs in that respect.

Q. But isn't it a fact that as to every loan you make you believe that the borrower has or will have the ability to repay without the necessity of foreclosing on the property?

A. You mean on the individual loans that I make?

Q. Yes.

A. No, I have made some loans that I knew that the borrower or debtor was hopeless and could never pay. But I thought the property was worth the price that it was mortgaged to me for, and while I didn't expect to get or keep the property, I thought that it was good enough for somebody else to take it off of my hands, which proved to be the case afterwards, and that is the way I got my money.

Q. Of course banks cannot lend on that theory?

A. No, I don't think they do."

The testimony of the other individual lenders called as witnesses by defendants is merely corroborative of that of Mr. Feist and Mr. Lane; and we refer Your Honors to it without quotation.

So much for the individuals: now let us see what competition is furnished these individuals by the banks in the matter of seeking loans secured by mortgage on real estate.

If any one thing is plain from the evidence in these cases, it is that the plaintiff banks are in no actual sense competitors of the individuals and corporations lending money on the security of real estate mortgages, whether long-time or short-time. We say this is plain because of the admissions of the officers of these banks while testifying in their behalf in these cases.

Mr. Ben Johnson, the president of the Commercial National Bank, while difficult to corner on cross-examination, did admit *(R. 102, et seq.)* that generally speaking national banks have avoided real estate loans and that the making of a loan by a national bank in Shreveport on the security of real estate alone would be an unusual transaction. We quote parts of his testimony as follows:

"A. It is possible such loan might be made.

Q. But is it your practice to make it or would such be an exception?

A. It would be an exception.

Q. Is it not a fact Mr. Johnson, that so far as it can do so, the Commercial National Bank

avoids making direct loans on real estate except in cases where, in the opinion of the bank or its officers or executive committee, the resources of the borrower are such that he can repay that loan without reference to a sale of the real estate?

A. Yes, sir.

Q. Is it not also a fact Mr. Johnson, that the Commercial National Bank will not make a long-term loan upon real estate, and by long-term I mean the repayment term of which extends over a period of say from five to twelve years?

A. We may make legally on real estate a loan for a period of five years.

Q. I know that you may, but that is primarily a question of law about which I am not asking you. My question is: is it not a fact that as a matter of practice you do not want to do so and you do avoid doing so?

A. Yes.

Q. Was it not for the purpose of handling these long-term and other loans on real estate which a national bank ordinarily does not care for that the Commercial National Company was organized?

A. That was one of the reasons for the organization of the Commercial National Company.

* * * * * *

Q. Isn't that true, Mr. Johnson, in practically every case, that is that the bank either makes loans on real estate to its customers, that is to people who are already doing business with it and whose patronage and business it desires, and only to those new customers or those people whose business it wants and is willing to take and is will-

ing therefore to make loans on real estate to get?

A. Yes, but it is also true that an individual may come into the bank and offer highly satisfactory real estate security and apply for a loan for one, two, three or six months at a satisfactory rate and we have evidence that that party will be able to repay that loan at maturity where we would make the loan upon real estate solely for the interest and profit in that particular transaction.

Q. That character of loan is an exception rather than the rule, is it not?

A. Yes.

Q. And very much of an exception?

A. I don't know just how very much of an exception it involves.

Q. Is it not true Mr. Johnson, that in the past year you have not had as many as ten cases of that kind?

A. I don't know.

Q. Of your own personal knowledge have there been ten cases of that kind?

A. I cannot now recall as many as ten cases of that kind, no, sir.

Q. **Is it not also true that the average individual who goes to a national bank in the City of Shreveport, and particularly to the Commercial National Bank, and says, 'I want to borrow money on my real estate', is usually told that a national bank does not make a business of lending money on real estate, and is either referred to some other source or told he must go elsewhere, is that not usually true?**

A. **That is the general practice, yes."**

(R. 102-115).

Mr. Andrew Querbes, president of the First National Bank, is much more direct in his testimony on cross-examination than Mr. Johnson:

"Q. Is it not in fact the general practice of the First National Bank and has it not been particularly true during the year 1930 and previous years, not to lend money solely on the security of real estate without regard to the responsibility of the borrower otherwise?

A. Yes, sir.

Q. Has it not been your effort and the effort of your associates in control of the First National Bank to keep its port folio as free as possible from direct real estate loans?

A. Yes.

* * * * * *

Q. Is it not likewise a fact, Mr. Querbes, that generally speaking the First National Bank will not lend to a borrower on the security of real estate if it has to look only to that real estate and to the proceeds of the sale of the real estate for repayment?

A. No, sir.

Q. When you state no, sir, did you mean it was a fact or was not?

A. We will not lend on real estate loans at all. We don't make real estate loans. That is our policy."

(R. 145-146).

Mr. Philip Lieber, president of the Shreveport Mutual Building Association, testified *(R. 220-221)* that Mr. Val Murrell, then the Cashier of the Commercial National Bank and now president of the Commercial-American National Bank, had told him, in reply to a direct question with regard to their policy of making loans on real estate,

that it would make such loans only where the assets of the applicant were sufficient to insure the repayment of the loan without having recourse to the value of the real estate.

Mr. N. B. Stoer, president of the Real Estate Exchange and a well known real estate operator in the city, testified *(R. 257-258)* that it has been a matter of common knowledge in the city of Shreveport during the entire year 1930 that national banks will not make loans on real estate.

Mr. Sam Feist testified *(R. 259-260)* that the national banks of Shreveport do not take long-term real estate loans and that during 1930 applicants for such loans had been repeatedly referred to him by the national banks of Shreveport.

C. W. Lane testified *(R. 261-262)* to exactly the same effect; in fact, while there may be ground for dispute as to other issues of fact in the case, we do not believe that any reasonable doubt can exist as to the attitude of the plaintiff banks toward real estate loans during the year 1930 and at the present time. They did not want them then, they do not want them now and they cannot in any sense be regarded as competitors of the individuals and corporations who make a practice of lending money on the sole security of mortgages on real estate.

This brings us to the small loan companies, which under Louisiana law are permitted to charge interest at the rate of 3½% per month and which lend chiefly on the security of chattel mortgages. As a matter of ordinary

sense, it is obvious that the people who borrow from these small loan companies are not as a rule within that class to which the banks are willing to make loans. A man or woman, generally speaking, must be hard-pushed to be willing to pay the ruinous rate of 3½% per month interest; and certainly if that man or woman would be welcomed by one of the plaintiff banks as an applicant for a loan at six, seven or eight per cent. per annum, he or she would hardly seek out a "personal finance company", so-called, and pay 3½% per month interest on a loan which is generally secured by a pledge upon the household furniture or other movable property of a similar character owned by the borrower. While it is true that Mr. Blocker, a witness for the plaintiffs and the president of the Southland Investment Company, did testify that numbers of the people who have borrowed from his company could have obtained loans from the banks and that his company had about $10,000.00 loaned out at 3½% per month interest on stocks listed on the New York Stock Exchange or New York Curb Exchange, we think this witness' testimony will not appeal to the Court as being particularly credible, especially in view of its direct contradiction by the testimony of most of the other witnesses who were engaged in the same business and all of whom were called by plaintiffs.

Thus **Mr. Trippett,** president of the General American Finance System, Inc., which operates personal finance companies in a number of places, after testifying as to the general character of his company's business and the amount of money invested in it and the territorial extent of its operations, was taken up on cross-examination and in a frank and illuminating manner thus explained why people

who borrow from these personal finance companies are willing to pay 42% interest per annum:

"Q. Mr. Trippett, what is the general character of the business of your subsidiary companies?

A. It is a personal finance business and loans made by the subsidiary companies are confined to the maximum amount of Three Hundred ($300.00) Dollars with the maximum period of twenty (20) months to repay. They are operated under the uniform small loan law, and the security generally is just the signature of the maker or makers and usually a chattel mortgage on the household goods is taken which is most often not recorded.

Q. You say that most of them are not recorded?

A. Some of them are recorded, but most of them are not.

Q. Your company charges three and a half per cent. (3½%) per month interest?

A. On the unpaid balance, yes, sir.

Q. Mr. Trippett, what are the reasons for making a charge of three and one half per cent (3½% per month interest on the character of loans that you make where the personal loan department of the national banks lend at eight per cent?

A. There are a number of reasons. **One is that the people to whom we lend money cannot go to a bank and borrow money. They can't do it. We have found in our experience that we lend to people who have no bank credit, generally, and generally they owe a number of bills;** their record for paying their debts is not the best, not that they have intended to avoid paying the debts, but our investigation determines that they owe a number of accounts and they

cannot meet them, in other words, they cannot stretch their payments monthly to the various creditors, so they come to us and consolidate these into one and pay it all back by the month.

Another reason is that the collection system that we must employ and the overhead expense in connection therewith and other items entering into this particular business are so large that we must get a rate of return to justify it. In other words all of the expenses that we must incur, taken together and considering them, that unless we do charge a rate of three and a half per cent. (3½%) the result is a reasonable profit is not left for the company. This has been demonstrated by the record of operations of the companies doing business under the uniform small loan law on record in the State Banking Department Office and as shown in the report of that Department as of December 1930 in printed form.

Another reason is that the people who borrow money from our company or any other personal finance company have no security to offer generally. They probably have a set of furniture. If they keep house they have a certain amount of furniture, some of which may or may not be paid out. And we take a chattel mortgage on that furniture just as a further evidence of their good faith to pay out the loan. And they cannot meet the payments generally over a short period of time but require a longer period. That means a larger cost in servicing the loan and collecting it, and therefore if we charged less than three and one half per cent. (3½%) per month, the rate of interest that has been determined by the Russell

Sage Foundation after several years of research work along that line, we could not make a reasonable return on our investments. These are the three principal reasons. There are probably others.

Q. **Then, if I understand you correctly, the class of people to whom you lend are, generally speaking, people who have not sufficient credit standing with the banks to be able to get their loans from the bank, is that correct?**

A. **That is correct.**

Q. **Else they would avail themselves of the relatively low interest rate of the bank rather than coming to you?**

A. **That is correct.**

Q. Is it not true also that there is a correspondingly large risk in the loans that you make as compared to the loans that the bank makes?

A. There is a correspondingly larger risk in our loans than those that are made by the banks as compared with the loans that the banks make. **In fact the banks would not take the risk.** We expect to have losses and that is one justification for the rate. But the main justification is the fact that our method of collecting entails a rather large overhead expense, as is true with all companies conducting a business of this kind, and in fact is so large that a smaller rate of interest would not leave a sufficient return to the company itself. Now, there is another reason for the three and a half (3½%) per cent that I omitted to state, and this comes in comparison with the rate charged by banks. We lend only our own capital, and the cost of raising our capital

is larger than raising the capital incidental and necessary to other enterprises, or in banks. We have no deposits to accumulate capital which we may lend, as the banks have, and having only our own capital which we must go out and raise, the cost of raising that capital is large, and we necessarily must charge more than the bank would charge.

This reason, together with the other reasons I have already stated, justifies the rate we charge. You must take into consideration the fact that we charge three and a half per cent (3½%) on unpaid balances which really only amount to about twenty-two and a half per cent. or a little less than twenty-two and a half per cent. on the original amount of the loan.

Q. Taking the subsidiary companies one by one, the Shreveport company lends to people in that territory?

A. Within Shreveport only. They have made a few loans outside of Shreveport, but they discontinued that practice.

Q. And the Monroe business lends to people in Monroe?

A. Yes, sir.

Q. Is that true of Bastrop, Alexandria, Lake Charles, Lafayette and New Orleans, Bogalusa and all of the rest you named?

A. It is true of each one.

Q. **Each one lends only within its own territory?**

A. **Only within its own territory, yes, sir.**

Q. Do you require endorsers on any of that paper?

A. We have some paper that is endorsed, yes. We require endorsement where the person is not occupying the house or where he cannot

give any other security, but the endorsers are usually such people that banks would not accept them.

Q. You have however, required endorsers on a great deal of paper?

A. We require endorsers, yes, in some cases. In other words we will make loans on endorsement as well as household furniture.

Q. You would not make that loan except that you were satisfied with the endorser, would you?

A. No, we must be satisfied ourselves with the endorsers.

Q. **As I understand it you restrict your business to people who cannot get money at the banks?**

A. **We do not restrict it to that kind of people, but I would say that ninety-eight per cent. of the borrowers that we have are people that cannot go to the banks. And I believe one hundred per cent. of them now are that kind, who cannot go to the banks and borrow money.**

* * * * * *

Q. **Were there exceptions to that in 1929?**

A. **None that I know of. We have very often suggested that they go to the bank and they have said 'I have just been turned down by the bank.' We have very often suggested that.**

Q. **Are you familiar with the type of loans made by other people in the same line of business as your company?**

A. **A few.**

Q. **Is not what you have said true as to the customers of the others engaged in the same line of business?**

A. **It is true of all of them, yes, sir."**

(R. 139-144, inclusive).

We submit that the testimony of **Mr. Trippett** will commend itself to the Court because of its plain and sensible character.

Another witness who testified for the plaintiffs was **Mr. Baumgartner,** who is connected with the Morris Plan Company, which lends on an average of about $180.00 to each borrower and whose clients are chiefly salaried men or wage-earners who want to secure ready cash and pay it back monthly out of their salaries. While he testified on direct-examination that his company loaned money on listed stocks and bonds as collateral, he admitted on cross-examination that the total amount loaned by it on such collateral was only $1200.00.

Mr. S. O. Williams, of the American Finance Company, testified that his company was engaged in the general run of business ordinarily done by small personal loan companies charging 3½% per month and lending on personal endorsements and chattel mortgages. He testified on cross-examination that all of the companies that he named were doing the same character of business as the General Finance Company, Mr. Trippett's company. *(R. 177).*

The business done by the Morgan Plan Company, as explained by its local manager **Mr. R. C. Davis** *(R. 177-180)* is practically identical with that done by the Morris Plan Company.

It is true that, as testified to by both **Mr. Johnson** and **Mr. Querbes,** each of the plaintiff banks maintains its small loan department; but the class of people for whose benefit the banks maintain this small loan department is an entirely different class from those who constitute the clientele of the personal finance companies.

Mr. Andrew Querbes, president of the First National Bank, one of the leading witnesses for plaintiffs, thus described the class of people who are served by the personal loan department of his bank:

"Q. With regard to your personal loan department, why was that personal loan department organized?

A. Well, first to render a service to a class of people who had no banking connections; second, to create future business for the bank by keeping in touch with these people.

Q. In lending to persons whose loans come within the classification of your personal loan department, does the First National Bank exercise a high degree of precaution?

A. Yes, sir.

Q. Are you careful, in other words, to lend only to people who are responsible and certain to repay these loans?

A. Yes, their reputation for payment must be good. We are members of the Retail Merchants Association here and if a fellow doesn't pay his bills we don't lend him money.

Q. Do you make loans to persons in that department on the security of chattel mortgages on their household furniture?

A. No."

(R. 120).

Mr. W. L. Young, one of the vice presidents of the same bank, likewise called as a witness for plaintiffs, also testified to the same effect:

"Q. Isn't it a fact Mr. Young, that during the past two years bank credit has been increasingly hard to obtain?

A. That is true.

Q. And isn't it also true that the banks have been more and more careful, and that includes your bank, in the character of people to whom they lend and the kind of collateral required?

A. Yes, sir.

Q. That condition is still true today?

A. Yes, sir."

(R. 195).

Mr. Johnson, of the Commercial National Bank, while testifying in a general way that his bank engages in making small loans to a **limited** extent, states at the same time *(R. 116)* that he **believes** them to be loans under $300.00 "made on either one or two name paper"; and further admits *(R. 106-107)* that in making such loans the Commercial National Bank, of which he is president confines itself to borrowers whom it feels will be able to promptly repay the amount of the loan.

All in all, we think we are safe in saying that these small loan companies are not engaged in a business which brings them, generally speaking, into competition with national banks, as they solicit and obtain their business from people who deal with them chiefly because they cannot get loans from the banks or from any other source and who have no other security to offer to the lender than

a mortgage on chattels, on which no national bank would be willing to make a loan.

The claim advanced in behalf of plaintiffs that the automobile finance companies are competitors of the bank is, if possible, even less meritorious than the others that we have heretofore considered.

The evidence in these cases shows that these automobile finance companies are not only not competitors of the banks but are feeders of and sources of profit to the banks themselves. While it is true, as testified to in a very general way by **Mr. Johnson** and in a more explicit way by **Mr. Young,** that the banks do lend in certain instances to automobile dealers, taking chattel mortgages on their new automobiles as security for the repayment of the loan, that practice is, as stated by **Mr. Young,** confined exclusively to those dealers whose credit standing with the banks is of such a nature that they do not have to resort to the motor finance companies for the financing of their credit sales.

It is shown beyond question here that none of the plaintiff banks solicit loans on chattel mortgages and none of them want to make loans on chattel mortgages of any kind. **Mr. Querbes,** testifying for the plaintiffs, stated flatly that his bank, the First National Bank, did not make loans on the strength of chattel mortgages; and **Mr. Young,** the vice president of the same bank, while testifying that in one or two cases, such as for instance that of the *Bernstein-Lanford, Inc.*, the bank had accepted chattel mortgages as at the time of making loans admitted that the financial condition of the mortgagor or its endorser was such that the loan would have been made without reference to the chattel mortgage.

We think it plain from the testimony of the bankers themselves and from that of **Mr. George Wray** and **Mr. Justin Querbes,** who are the presidents of the two largest motor finance companies here, that these companies are no more competitors of the banks than are the individuals who lend on the security of long-term real estate mortgages, both being types of loans that the banks themselves, except in unusual cases, are not willing to make.

We quote pertinent portions of the testimony of **Mr. Andrew Querbes, Mr. Justin Querbes, Mr. Young, Mr. Johnson** and **Mr. Wray** on this point as follows:

Mr. Andrew Querbes:

"Q. Will the First National Bank lend upon the sole security of automobiles just as the Motor Finance Company will lend?

A. No.

Q. You, however, do lend to the Motor Finance Company?

A. Yes.

Q. The Motor Finance Company is likewise a valued customer of your bank?

A. It is.

Q. Are there any other companies doing a similar business to that of the Motor Finance Company that do business with your bank?

A. Yes.

Q. What?

A. The Motors Securities Company.

Q. Is it engaged in the same character of business?

A. Yes, and there is the Federal Securities Company also.

Q. Are these people valued customers of your bank?
A. Yes.

Q. They borrow money from you?
A. Yes.

Q. And they deposit money with you?
A. Yes.

Q. Mr. Querbes, what would be your attitude towards a prospective buyer on the security of an automobile if the moral responsibility and earning capacity of the prospective borrower satisfied the requirements of the bank?
A. We would lend him on his plain note but would not take a mortgage on the automobile to secure it."

(R. 129-130).

Mr. Justin Querbes:

"Q. Mr. Querbes, you live in Shreveport and have lived here all of your life?
A. Yes.

Q. You are President of the Motor Finance Company?
A. Yes.

Q. You are also a director of the First National Bank?
A. Yes.

Q. The testimony has shown, by the testimony of Mr. Lieber, that the Motor Finance Company makes certain credit investigations in making loans to purchasers on automobile loans. State to the court the nature of the credit investigation you make and its extent.
A. Well, the dealer submits the name of the prospective purchaser to our credit department, and we investigate the man through various

associations that are here for that purpose, to determine principally the man's occupation and not only his ability but his willingness to pay and the fact that he has a job and is likely to keep it. Of course we very rarely investigate his financial worth or request a financial statement. We never do that.

Q. Are you familiar with the practice of the banks in Shreveport in investigating credit in making loans that are considered bankable loans?

A. Yes.

Q. What is the nature and extent of that credit investigation?

A. Well, it is quite different from ours. The banks, of course, will get the financial responsibility of the man principally, and then they require a financial statement. And they go into his business in detail. Their investigation is entirely different from ours and much more minute.

Q. The primary object of your investigation is what?

A. Is to find out the ability and willingness of the purchaser to pay these credit installments.

Q. It was also shown by the testimony that you had a considerable carrying charge, as it was designated. Will you state the principal elements that enter into that carrying charge?

A. Well, we have to take into consideration the cost of the insurance by which we could protect the unpaid balance of the purchase price and the collection expenses involved in handling these notes, and the overhead that we must necessarily go to. **Of course we**

must borrow the bulk of the money that we lend from the banks and we must pay them interest for that. And of course our service charge must carry our overhead expense and all of these other items, and allow us a profit.

Q. What are the items of your operating expense?
A. Maintenance of a credit department, the collection of notes. I would say that the collection of notes is probably the largest.

Q. Does that include the repossession of automobiles?
A. Yes.

Q. Is that a large item?
A. Yes.

Q. Must you maintain a special force to do that sort of thing?
A. Yes.

Q. Could your business survive if you did not?
A. No, sir.

* * * * * * *

Q. Do you know to what extent the First National Bank does make unsecured small loans along the same lines you do?
A. Well, I would say to a very small extent.

Q. To a very small extent?
A. Yes.

Q. They do make such loans?
A. Yes.

Q. And in that class of loans they go through practically the same procedure you do?
A. Except that they have the guarantee of the individual who is disposing of that paper and they take that without regard to the notes themselves.

Q. Usually they require an endorser?
A. It isn't an endorser, it is usually a guarantor.

Q. You are speaking about automobile notes?
A. Yes."

(R. 252-253-254).

Mr. Young:

"Q. Then the chattel mortgages do not cut a very large figure in that loan, do they? In other words, you would have loaned it the money without the chattel mortgage?

A. That is right—Well, I don't know in this case. I think we rely largely on the security of the mortgage itself, because we are lending money and taking chattel mortgages on the cars at the factory prices and there is always a margin there, and we check these cars out every thirty days to see if they are there.

Q. That borrower is a regular customer of your bank?
A. Yes, and has been for a number of years.

Q. Does the bank lend on chattel mortgages except to its regular customers?
A. As a rule we do not.

* * * * * *

Q. Isn't it a fact then, Mr. Young, that the character of business that is done by these motor finance companies is a business that is not desired or solicited and is really not indulged in by the First National Bank?
A. The kind that the motor finance companies do?

Q. Yes.
A. **Yes, that is true. The banks have had unhappy experiences in some instances and they do not seek that class of business.**

Q. Is it not also true that if a stranger were to go to the First National Bank with a new automobile that he wanted to borrow from the bank on a chattel mortgage on that automobile it would be very difficult for him to get the money?

A. It would be very difficult.

Q. And isn't the same true with reference to radios and electrical signs and equipment?

A. **Yes, it would be so difficult you might say that he could not do it.**

* * * * * *

Q. Your bank is not engaged in the automobile finance business, that is you do not lend for the length of time nor on the terms nor under the conditions that the motor finance companies generally do?

A. No.

Q. Is it not also a fact that several of them that are valued customers of your bank and regularly borrow from your bank?

A. Yes.

Q. And deposit with your bank?

A. Yes.

* * * * * *

Q. With reference to the Bernstein-Lanford account you have the endorsement or guarantee of Mr. E. R. Bernstein?

A. Yes, sir.

Q. And Mr. Bernstein's guarantee would make that company's line of credit for at least the amount that the company owes you good?

A. In my opinion it would.

Q. Then, isn't it a fact that the Bernstein-Lanford, in turning these chattel mortgage notes over

to you, merely are using the bank as a convenient method of collection or convenient place for their customers to pay off?

A. That is a matter of opinion. I know that the opinion has been expressed at times that customers in some cases do use the bank for that purpose. But I don't want to say that Mr. Bernstein's rediscounts are placed in there for the convenience of the company is using the bank as a collection agency.

Q. Well, I will ask you this question then, Mr. Young, if, with the guarantee that you have of the Bernstein-Lanford Company, if it wanted to borrow the same amount of money and not put up any chattel mortgage at all, wouldn't you lend it to them just as freely?

A. Yes."

(R. 195-196-197).

Mr. Johnson:

"Q. Mr. Johnson, does the Commercial National Bank lend to individuals on the security of their automobiles?

A. In part, yes.

Q. Do you mean by that if Mr. John Smith owning an automobile desires to borrow money on that automobile the Commercial National Bank will lend to him money on it and take a chattel mortgage on the automobile as security?

A. Yes, that has been done.

Q. How often has it been done say in the last year?

A. Rarely?

Q. Rarely?

A. Rarely.

Q. It really doesn't amount to anything in comparison of the gross amount of the bank's business, does it?

A. No.

Q. Have you among your customers, and by that I mean both borrowers and depositors, companies which are engaged in the business of lending money on automobiles?

A. Yes, sir.

Q. Do those companies borrow large sums of money from you?

A. Yes, sir.

* * * * * *

Q. Take, for instance, Mr. Johnson, the case of the Federal Securities Company. It does business with you?

A. Yes.

Q. It borrows large sums of money from you from time to time?

A. Yes.

Q. Is its account a profitable one?

A. Yes.

Q. Do you attempt, and by you I mean does the Commercial National Bank attempt, to attract the character of borrowers to whom the Federal Securities Company lends its money?

A. Generally no."

(R. 207-208).

Mr. George D. Wray, a director of the First National Bank and president of the Motors Securities Company, after having testified to his general familiarity with

the character of loans made by the Commercial National Bank, was asked:

"Q. Would the Commercial National Bank as a matter of practice make loans of the character that your company makes?"

to which he answered:

"No, I think not."
(R. 249-250).

On **cross-examination** he was somewhat more emphatic:

"Q. Now, Mr. Wray, when you say that the bank ordinarily does not handle the kind of paper you take you mean primarily that the bank would not be inclined to take notes on the purchase of automobiles extended over a long period of time in installments, do you not?

A. Well, I consider that the business of automobile financing is a business within itself and it is too hazardous, I think, for the bank to engage in."
(R. 250-251).

We are not entirely clear as to why the cotton brokers, such as the Glassell-Hicks Company and W. C. Linsday Company, were brought into the case at all. Certainly it is self-evident that the principal business of these commission companies, or cotton factorage brokers as they are called, is handling cotton on a commission basis; and the fact that in the course of their operations and as an incidence of their business they arrange loans for their customers by borrowing money from the banks and advancing it to the customers does not make them competitors of the banks any more than the fact that the Cities Service Companies sell their stocks and bonds to the public

makes them competitors of the banks. True it is, as we have before said, that theoretically to some extent almost every business competes with the banks in some one phase of the banking business, for all use and handle money; but where the principal business is non-competitive and the competition is merely incidental to the conduct of the principal business, it is clear under the settled jurisprudence of the Supreme Court of the United States that such competition is not the kind against which the banks were intended to be protected by the provisions of *Section 5219 of the Revised Statutes.* As to these cotton factorage companies, it may likewise be remarked that even if they were direct and substantial competitors of the banks, the law makes no discrimination whatsoever in their favor as against the banks. The credits of these cotton brokers in the form of advances to their customers are subject to assessment and taxation in Louisiana just as are bank stocks; and if these particular concerns have in fact not been assessed and taxed to the amount of such credits, then the assessor is to blame and not the law.

The only other competition that plaintiffs attempted to prove is that of the Frost-Whited Investment Company, Inc., the Querbes Company, Inc., and the Commercial National Company, Inc. As to the first two of these companies, the evidence adduced is, we submit, too vague to justify a finding by this Court that any substantial part of the capital employed by them is directly engaged in competition with the plaintiff banks.

Mr. F. T. Whited, secretary-treasurer of the Frost-Whited Investment Company, Inc., testified *(R. 144-145)*

that the amount of capital invested in his company is $1,250,000.00; that its trade territory is "within a radius of probably one hundred miles of Shreveport"; and that its business is **"owning securities and investments and in making loans."** There is no evidence as to the character of the loans or investments or securities, nor as to how much of the capital of the corporation is employed in making loans and investments or in buying securities of a particular kind. While there is no legal presumption either way, we have no doubt that this company makes large investments in real estate mortgages and if our view of the law as applied to the facts in this particular case is correct, capital so invested is not capital invested in competition with the plaintiff banks.

The same observation is true as to the business of the Querbes Company, Inc.

Testimony in regard to the business of both of these companies falls far short, we respectfully submit, of being sufficient for that clear proof of substantial competition, the burden of producing which rests exclusively on the shoulders of the plaintiff banks.

As to the Commercial National Company, Inc., the evidence of **Mr. Johnson** himself shows that that company was organized and operates only as an adjunct to or facility of the Commercial National Bank. The type of loans that it handles and the kind of financing that it does are loans and financing that the national banks prefer not to themselves undertake. Thus **Mr. Johnson** testifies:

"Q. Was it not for the purpose of handling these long-term loans and other loans on real estate which a national bank ordinarily does

not care for that the Commercial National Company was organized?

A. That was one of the reasons for the organization of the Commercial National Company.

Q. Was it not the chief reason?

A. No.

Q. What was the chief reason?

A. To facilitate the handling of bonds and securities, for the purchase and marketing of the securities **and for the handling of transactions not specifically authorized by the National Banking Act.**

Q. **Wherever a transaction is not authorized by the National Banking Act but it is nevertheless desirable that your banking unit, and in that I include the Commercial National Company, should handle it, you handle it through the Commercial National Company?**

A. **Yes, sir.**

* * * * * *

"Q. Coming now to the Commercial National Company. If I understood your testimony correctly this morning that company was organized by the same people who owned the Commercial National Bank, and for the purpose of handling business that either a national bank is not permitted to handle or that the Commercial National Bank would find it not convenient to handle?

A. Or that could be better handled through an investment company.

Q. Is it not true then that the Commercial National Company is controlled by the same people who control the Commercial National Bank and is operated outright by these same people?

A. Yes.

Q. Then, if a piece of business is offered to the Commercial National Bank which it considers more desirable to handle through the Commercial National Company it handles it through the Commercial National Company?

A. Yes.

Q. And if it is felt more desirable to handle it through the Commercial National Bank, it handles it through the Bank?

A. Yes."

(R. 105-106-113-114).

We have here a case then where a national bank organizes in the name of its stockholders a subsidiary corporation for the purpose of handling business which as a national bank it is either prohibited from handling or finds it undesirable to handle; and then while using this subsidiary actually as an additional facility for the handling of business by it asks this Court to hold that this subsidiary is engaged in active and substantial competition with its parent bank.

Mr. Johnson is the president of the plaintiff bank and of its subsidiary, the Commercial National Company, Inc.; and his evidence will naturally be construed most strongly against the plaintiffs. We are satisfied that Your Honors will conclude from a reading of Mr. Johnson's testimony as a whole that he was not trying to help the defendants, and it seems to us that if the Commercial National Company, Inc., is actually a competitor of the plaintiff banks it would have been easy to produce definite proof of

the fact. Here, again, we think the plaintiffs have altogether failed to meet the requirements as to the character and precision of the proof required in order to show a discrimination against them in the matter of state taxation.

It has been repeatedly held by this Court that one who attacks the validity of a state taxing statute bears the burden of proof throughout the entire case as to every material allegation of his complaint. Every doubt is resolved in favor of the validity of the statute and the evidence offered must clearly show the existence of the grounds of nullity.

Amoskeag Savings Bank v. Purdy, 231 U. S. 376, 58 L. Ed. 275.

In *First National Bank v. County of Chehalis, 166 U. S. 439, 41 L. Ed. 1069*, this Court reviewed practically its entire jurisprudence on the question of taxation of national banks by states up to the time of the rendition of that decision and concluded by quoting at great length from its decision in *Mercantile Nat. Bank v. New York, 121 U. S. 138, 30 L. Ed. 895*, which it held to be the settled law on the subject and which is, as we have before pointed out, adhered to and followed to this day. The **syllabus** of the cited case correctly summarizes the decision and reads as follows:

> **"The omission from taxation of investments by individual citizens in loans and securities, and of moneyed capital invested in stocks and bonds, does not make the taxation of the shares of capital stock in a national bank invalid as an unfair discrimination against the latter, unless it is shown that the money invested in the property which is not as-**

sessed comes into competition with the business of national banks.

"An allegation that investments were 'taxable capital', without describing their character, is an averment in the nature of a legal conclusion."

(Pars. 3 and 4).

The decision in the case of *National Bank of Commerce v. Seattle,* which immediately follows the *Chehalis* case, is noteworthy here only in that it emphasizes the necessity of a clear and definite allegation of discrimination against the banks and in favor of competitive capital. The decision is so short that we quote it in full:

"The bills of complaint in these cases are substantially of the same legal import, so far as any Federal question is concerned, with that considered in the case of First Nat. Bank v. Chehalis County, in which the opinion of this court has just been delivered.

"The only difference that we note is that, in connection with the allegation that there existed large amounts of taxable moneyed capital owned by resident citizens and invested in interest-bearing loans and securities, there is made the additional allegation that **all of said other moneyed capital referred to was all the moneyed capital in the city owned by resident individual citizens and invested in interest-bearing loans, discounts, and securities, except that invested in incorporated banks located in the city.**

"It is not perceived that this additional allegation calls for any different conclusion than the one reached in the previous case. We are still uninformed whether the moneyed capital left unassessed was, as to any material portion thereof, moneyed capital coming into competition with that of

national banks. The averment that the moneyed capital exempted was 'taxable' does not enable us to say that it therefore consisted of investments within the meaning of the term 'moneyed capital' as used in the act of congress."

In *First National Bank v. Chapman, 173 U. S. 213, 43 L. Ed. 673*, it is said:

"It is claimed in substance that all credits are moneyed capital, and that they are large enough to amount, when compared with the moneyed capital invested in national banks, to become an illegal discrimination against the holders of such shares.

"There is no finding of the trial court upon the subject of the total amount of credits in the state. Reference was made on the argument to the report of the auditor of the state for 1893, from which it is said to appear that the total credits, after deducting the debts allowed, were $106,000,000 or $111,000,000, the amounts differing to that extent as presented by the counsel for the different parties. The case does not show that the trial court received the report in evidence and nothing in any finding has reference in any way to that report. We do not think it is a document of which we can take judicial notice, or that we could refer to any statement or alleged fact contained therein, unless such fact were embraced in the finding of facts of the trial court upon which we must decide this case.

"However, if we were to look at this report, we should then see that the total credits do not show what portion of those credits consists of moneyed capital in the hands of individuals, which in fact enters into competition for business with national banks. It is only that kind of moneyed capital which this court, in its decisions above cited, holds is moneyed capital within the meaning of the act of Congress.

> "As a result we find in this record no means of ascertaining whether there is any unfavorable discrimination against the shareholders of national banks in the taxation of their shares, and in favor of other moneyed capital in the hands of individual citizens. There is nothing upon the face of these statutes which shows such discrimination, and therefore it would seem that the plaintiff in error has failed to make out a case for the intervention of the court."

When the decisions that are cited and quoted from in the brief filed by the learned counsel for plaintiffs are carefully read, it will be found that nothing held in any of them leads to a conclusion in the present cases different from that which we maintain must be necessarily reached; for in every case cited in the brief for plaintiffs and in every other case that we have been able to find in which this Court holds that the taxation of national bank shares by a state was invalid, the facts were so different from the facts in the case at bar that the same principles of law when applied to the facts in these cases sustain the validity of the tax in question here. Taxation, as this Court has repeatedly said, is an intensely practical affair; a consideration which, when applied to the large body of jurisprudence of this Court in regard to the taxation of national banks, enables us to distinguish on their facts decisions in cases which, if the general language used by the Court were alone considered, would appear to be almost directly in conflict. Each one of these cases stands on its own facts and in each of them before reaching a conclusion as to the validity of the tax imposed in the particular case, this Court has first determined the extent to which proof

has been made of the existence of the several conditions under which such taxation is or is not permissible.

This was pointed out by Mr. Justice Van Devanter, who was the organ of this Court in the case of *Des Moines National Bank v. Fairweather, 263 U. S. 102, 68 L. Ed. 191*, in commenting on the effect to be given to a prior decision of the Court:

> "Counsel for the bank regard the case of Bank of California v. Richardson, 248 U. S. 476, 63 L. Ed. 372, 39 Sup. Ct. Rep. 165, as qualifying Van Allen v. Assessors and other cases which reaffirmed and applied its ruling. But the case is not fairly open to that interpretation. **Some expressions are found in the opinion which, if taken literally and alone,** seem to treat the stockholders and the bank as one for taxing purposes; but the opinion as a whole and the ultimate decision demonstrate that these expressions fairly cannot be taken in that way, and that there was no purpose to qualify the ruling so often announced and applied in earlier cases. That case was exceptional in its facts."
>
> *(263 U. S. 114; 68: 199).*

Let us take, for instance, the decision in the case of *First National Bank v. City of Hartford, 273 U. S. 547, 71 L. Ed. 767*, which appears to be more relied upon by plaintiffs than any other case. In that case some parts of the general language used by the Court in the decision if separated from the remainder of the opinion and considered without reference to the particular facts in that case would lend countenance to the theory of the plaintiffs that the exemption from taxation in Louisiana of mortgages secured by Louisiana real estate constitutes a discrimination against the plaintiffs; but when the opinion

in the *Hartford* case is taken as a whole and when the Court's findings of fact in that case are compared with the facts in the case at bar, such an interpretation becomes, as we see it, inadmissible. The principles upon which the *Hartford* case was decided, while they led to the annulment of the tax against the plaintiff in that case, operate to produce an exactly opposite effect in this case, where the facts are markedly different.

In the *Hartford* case Mr. Justice Stone, who was the organ of the Court, referring to the *Anderson* case *(70 L. Ed. 303, 46 Sup. Ct. Rep. 135)* for a definition of the meaning of "other moneyed capital" as used in Section 5219 of the Revised Statutes, said:

> "Hence the question presented by this record is whether the tax imposed upon the shares of stock of plaintiff under the Wisconsin statutes is at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens of Wisconsin employed in substantial competition with national banks.
>
> "By par. 70.31 of the Wisconsin statutes, an ad valorem tax is assessed upon all shares of banks, including national banking associations, as personal property within the assessment district in which the bank is located. Section 70.11 exempts from such taxation 'all moneys or debts due or to become due to any person and all stocks and bonds, including bonds issued by any county, town, city, village, school district, or other political subdivision of this state, not otherwise specially provided for.'
>
> "Acting under these statutes, the taxing authorities imposed the tax now in question, but made no assessment and levied no tax upon credits or intangible property other than the shares of stock

in banking corporations. The state of Wisconsin imposes a tax upon incomes, including incomes derived from credits. **The court below assumed, and it was not questioned upon the argument here, that this tax is not to be taken as an equivalent or substitute for the ad valorem tax levied upon bank shares and no question of the possible equivalence of the two schemes of taxation is presented.** From the sections cited, it appears that the tax statutes of Wisconsin discriminate in favor of moneyed capital and capital investments within the state, represented by credits or intangibles and against that invested in shares in banking corporations.

"But it is not sufficient to show this discrimination alone. The validity of the tax complained of depends upon whether or not the moneyed capital in the state thus favored is employed in such a manner as to bring it into substantial competition with the business of national banks.

"The question thus raised involves considerations both of fact and of law. To answer it, it is necessary to ascertain the nature and extent of the moneyed capital in the hands of individual citizens within the state and the relation of its employment, in point of competition, to the business of plaintiff and other national banks. **It is necessary also to ascertain the precise meaning to be given the statute as applied to the facts in hand in order to determine whether the particular moneyed capital and the particular competition with which we are here concerned are moneyed capital and competition within the spirit and purpose of the statute."**

(273 U. S. 550; 71:770).

It will be noted that what the Court was concerned in determining in the *Hartford* case was whether the particular moneyed capital and the particular competition to which the testimony in that case related were moneyed

capital and competition within the spirit and purpose of the statute, just as in this case this Court is concerned in determining the character of the particular moneyed capital and the particular competition to which the evidence in this case relates.

It will likewise be noted that the broad exemption from taxation of the Wisconsin statute included all credits, stocks and bonds; whereas, our law exempts only such as are considered to have been already taxed or such as the avowed public policy of the state requires should be exempt.

It was taken for granted in the *Hartford* case that the exemption of shares of stock in corporations other than banking corporations was a discrimination pure and simple in favor of shareholders in all corporations other than those engaged in the banking business and was not, as it is in Louisiana, an application of the general principle of taxation of the state that property which is taxed in one form by the state law shall not be in substance taxed in another form, though legally and technically such a tax might pass the test of constitutional validity.

Credits, generally speaking, are taxable and taxed in Louisiana:

> *Bemis Brothers Bag Company v. Louisiana Tax Commission, 158 La. 2, 103 South. 337;*
> *Southland Investment Co., Inc. v. Jeter, 171 La. 106, 129 South. 722;*

but shares of stock in corporations other than banks are not taxed because a tax is levied upon the property owned

by the corporation, so that to tax both the corporation upon its property and the shareholders upon their shares of stock in the corporation is abhorrent to the principles of fairness and equality and avoidance of double taxation that form a substantial part of the groundwork of the Louisiana taxing system. Perfect equality—mathematical exactness—is, of course, not possible in any taxing system; but the Louisiana system is, we submit, reasonably calculated to so distribute the burden of taxation of moneyed capital as not to discriminate against that employed in national banks.

An analysis of the facts on which the decision in the *Hartford* case was based shows the numerous and important distinctions between those facts and the facts in the case at bar. In the *Hartford* case the Court said:

> "The evidence shows that plaintiff in the course of its business receives deposits, loans money, has a savings department, deals in exchange, buys and sells notes, government and other bonds, discounts commercial paper **and acquires real estate mortgages by loan and purchase.** On the trial, plaintiff called numerous witnesses who gave testimony, **uncontradicted by defendant,** tending to show the nature and extent of various classes of moneyed capital in the hands of individuals in the state and the nature of its employment **in competition with the business carried on by national banks.** There are real estate firms engaged in lending money to individuals in the vicinity of plaintiff's banking house, the amount thus loaned amounting annually from $250,000 to $300,000. **According to the testimony the making of these loans affords the same competition to plaintiff as loans made by banks. * * * Neither the capital employed in these various enterprises by individuals or corporations, so far as**

invested in the credits, nor the shares held by investors in such corporations is subjected to the *ad valorem* tax.

"Upon this evidence, the trial court found that during 1921 moneyed capital in the hands of individual citizens in the vicinity of plaintiff's banking house, amounting to many hundreds of thousands of dollars, which was not assessed for taxation nor taxed, was employed in a manner which brought it into competition with the business conducted by national banks, including that of plaintiff. It also found that moneyed capital to the extent of millions of dollars held by individual citizens throughout the state, and employed in a manner which brought it into competition with such banks, was similarly exempt from this taxation."

And again:

"Here, large amounts of capital are shown to be invested in businesses carried on throughout the state which are of the same character as some though not all of the business carried on by national banks in the state of Wisconsin having a capital and surplus in excess of fifty millions of dollars and engaged in the business of making loans, and that there is an extensive loan business in the state not subjected to the tax burdens of national banks, and it was testified directly that this business came into competition with the business of plaintiff and other national banks, we think that the finding of the trial court was supported by the evidence and should not have been disturbed.

"There was also, we think, sufficient evidence that private individuals as investors of surplus funds are engaged in loaning money at interest on real estate mortgages and other evidences of indebtedness **such as normally enter into the business of banking** and that these investments are of substantial amount. We do not conceive that in order

to establish the fact of competition it is necessary to show that national banks and competing investors solicit the same customers for the same loans or investments. **It is enough as stated if both engage in seeking and securing in the same locality capital investments of the class now under consideration which are substantial in amount."**

In the present case there is, we submit, no definite evidence of any substantial competition between any of the corporations of whose exemption from taxation either legal or practical the plaintiffs complain and the national banks who are the plaintiffs in this suit that exists now or existed during the year 1930, for which the taxes complained of were levied. It is, we think, shown beyond question that the plaintiff banks here not only were not during the entire year 1930 competitors of persons who were lending money on real estate and on chattel mortgages, but they were in every way possible endeavoring to avoid making such loans. In spite of the quibbling of two or three of the witnesses for the plaintiffs who were unwilling to admit that the policy of avoiding loans on real estate and chattels had been universally followed by the national banks during the entire year 1930, it is, we assert, plain from the evidence taken as a whole that such a policy was actually in effect and that these banks on innumerable occasions refused loans on real estate and chattels of the same character the making of which constitutes the greater portion of the business of the corporations which they allege are their competitors.

In the *Hartford* case there were numerous witnesses who gave testimony "uncontradicted by defendant" to the effect that the untaxed capital in that case was also directly

competitive. The plaintiff in that case was shown to have wanted and solicited loans on real estate and to have engaged generally in the business of buying and selling notes secured only by mortgage on immovable property. We have an exactly opposite state of affairs in this case, as the plaintiff banks here not only did not solicit such loans, but made it a practice to refuse to make them. No one of the plaintiff banks claims to have been a dealer in notes secured by mortgages on either chattels or realty; whereas, the undisputed evidence in the *Hartford* case established the character of the plaintiff as a dealer in such securities. In the *Hartford* case the Court found as a matter of fact that "moneyed capital to the extent of millions of dollars held by individual citizens throughout the state and employed in a manner which brought it into competition with such banks" was exempt from taxation to which the banks were subject. Here, again, we have a broad difference in facts, as the only evidence as to the employment of moneyed capital by individuals in making loans is the admission that more than $3,000,000.00 are invested in notes secured by mortgages in Caddo Parish, Louisiana, and its vicinity by individual citizens who habitually invest their own funds in such securities.

It is difficult for us to take seriously the argument that competition existed in 1930 between the individual who habitually invested his funds in real estate mortgages and a bank that sedulously avoided making such investments. The fact that the banks had made loans to customers, some of which were secured by the pledge of collateral in the shape of real estate mortgages is altogether without bearing on the question of competition when

the circumstances under which such loans have been made are considered. It is not to be doubted in view of the evidence in this case that practically all of the real estate loans which the plaintiff banks have were loans that were made to customers who were considered good for the amount of the loan without the collateral, the mortgages being taken in such cases only as an extra precaution or having been acquired by the banks from debtors who were unable otherwise to secure their already existing obligations to the banks.

As we understand the meaning of the word, "competition" means two or more people or corporations going after the same thing at the same time and in the same place; and to say that there was competition during 1930 between the plaintiff banks in these cases and the building associations and the individuals who made long-term loans secured by mortgage on real estate or the personal finance corporations which loaned at 3½% per month on chattel mortgages is to ignore the every-day practical common-sense meaning of the word. In plain language, the banks have not wanted these loans and have avoided them; whereas, the other lenders of money have sought them as investments.

It seems to us plain that if the evidence in the *Hartford* case had disclosed the existence of the same facts as have been disclosed by the evidence in these cases, the decision would have gone the other way.

Our conclusion in this respect is fully upheld by a consideration of the case of *Georgetown National Bank v. McFarland*, in which Mr. Justice Stone was likewise the

organ of this Court, and which is reported in *273 U. S. 566, 71 L. Ed. 779:*

> "Plaintiff in error, seeking to establish that the favored capital was in competition with national banks, relied principally upon the proof that there were substantial amounts of capital invested in the state by individuals in bonds, notes, accounts and mortgages, aggregating approximately $1,500,000, which it is contended represents moneyed capital in competition with national banks. But plaintiff made no attempt to show that there were other businesses or courses of investment in the state employing moneyed capital in competition with its business or that of other national banks. The evidence with respect to capital invested by individuals, taken as a whole, falls short of establishing that the capital thus used is employed substantially as in the loan and investment features of banking in making investments by way of loan or discount or in notes, bonds and other securities, with a view to sale or repayment and reinvestment.
>
> "The court of appeals of Kentucky, following the state practice, reviewed the evidence, concluding from it that 'no material part of the capital held by the individuals is so invested as to come in competition with the national banks'.
>
> "The evidence is set forth in the record. In some particulars it is conflicting and the conflicts are such that their resolution by the court of appeals should be accepted by us. It cannot be said either that the finding is without evidence to support it or that it certainly is against the weight of the evidence. In the course of the opinion the court of appeals gave more attention than we think justified to the difference between short-time and long-time loans and to the readiness with which the banks obtain loans, notwithstanding the competition alleged, but even after making due allowance for this we think the finding should not be disturbed."

In this decision this Court made only a general reference to the facts in the case; but the Court of Appeals of Kentucky, whose decision was affirmed by the Supreme Court, went very much more into detail. The similarity between the facts in the Kentucky case and the facts in these Louisiana cases which are being considered by this Court is striking. We quote from the decision of the Kentucky Court of Appeals, which is reported in *270 S. W. 995*, as follows:

> "In this case it is not shown by evidence without dispute that the moneyed capital in the hands of individuals invested in bonds, notes, and other evidences of indebtedness comes in competition with the national banks. While a number of witnesses so testify, there is testimony to the contrary, and the conclusion of the witnesses testifying to the existence of competition is not borne out by the facts shown by all the testimony. **It is shown by all the testimony that the banks make short time loans, and that they decline to make loans on long time.** It is also shown that the banks are lending to the limit and are rediscounting their paper in order to accommodate customers for a large part of the year. **The moneyed capital of individuals is invested in notes given for the purchase money of land or secured by a mortgage on land and running for a longer time than banks are willing to lend money for. It is not shown by anybody that any appreciable amount of money held by individuals is used in short time loans, such as the banks make, and, this being true, the capital invested in land notes and the like does not come in competition with the national banks, for they do not handle this character of paper.** The facts shown by the record warrant the conclusion that no material part of the capital held by the individuals is so invested as to come in competition with the national banks, and on the record we so hold."

The approval by this Court of the decision of the Kentucky Court of Appeals under the facts as found by the Kentucky Court is, to our minds, conclusive evidence that the general expressions used by this Court in the *Hartford* and *Minnesota* cases, the decisions in which immediately preceded that in the *Kentucky* case, were not intended to narrow the field of state taxation of national banks within closer limits than had previously been assigned to it by the earlier decisions. As we have before said and as this Court has repeatedly held, each case has to be decided on its own facts and in cases where, as in this case, the plaintiffs have not borne the burden of proof of showing an actual and substantial discrimination against them and in favor of citizens of the state who are directly engaged in competition with them, they have not made out a case for relief.

Thus, in the case of *Merchants National Bank v. Richmond, 256 U. S. 634, 65 L. Ed. 1135*, the taxing authorities had taken the position which had been upheld by the Supreme Court of Appeals of Virginia that the only competition against which Section 5219 of the U. S. Revised Statutes attempted to protect national banks was competition of state banks; so that if state banks were taxed at the same rate as national banks, it was immaterial whether or not other competing capital was taxed at a different rate. In the cited case it was alleged and shown by evidence without dispute that the capital which was taxed at a lower rate than that invested in the national bank shares came into direct competition with the plaintiff bank; but this showing of fact was ignored both

by the defendant taxing authorities and by the state courts, because of their erroneous conception of the law. Upon such a showing of fact the reversal of the judgment of the state court followed as a matter of course. It will be noted that the authorities upon which the decision in the cited case was based were the prior decisions of this Court:

Evansville Nat. Bank v. Britton, 105 U. S. 322, 324, 26 L. Ed. 1053, 1054;

Mercantile Nat. Bank v. New York, 121 U. S. 138, 30 L. Ed. 895; 7 Sup. Ct. Rep. 286;

Amoskeag Sav. Bank v. Purdy, 231 U. S. 373, 390, 58 L. Ed. 274, 281, 34 Sup. Ct. Rep. 114;

National Bank v. Seattle, 166 U. S. 463, 41 L. Ed. 1079, 17 Sup. Ct. Rep. 996;

First National Bank v. Chapman, 173 U. S. 205, 219, 43 L. Ed. 669, 674, 19 Sup. Ct. Rep. 407;

showing beyond question that nothing that was said by the Court in the cited case was intended to overrule the prior jurisprudence on the subject.

We may add that the decisions in the cases cited and approved in the *Richmond* case without exception support the view of the taxing authorities in these cases as to their proper decision.

In the later case of *First National Bank v. Anderson, 269 U. S. 339, 70 L. Ed. 295*, this Court thought it necessary to explain that its decision in the case of *Merchants National Bank v. Richmond* was not intended to give to the term "other moneyed capital" a broader meaning than it had before enjoyed and explained the broad general language used by it in the *Richmond* case by

pointing out that the defending tax authorities in that case had offered no evidence whatsoever to counteract the allegation and proof of the plaintiff bank that the capital which was taxed at a lower rate than itself was in fact competitive. This is what the Court said about the decision in the *Richmond* case:

> "In the briefs there is some discussion as to whether our decision in Merchants' Nat. Bank v. Richmond, 256 U. S. 635, 65 L. ed. 1135, 41 Sup. Ct. Rep. 619, attributed to the term 'other moneyed capital' a wider meaning than was recognized before. But nothing was said in the opinion indicating that an enlargement was intended. **On the contrary, it distinctly accepted the meaning adopted in prior decisions.** The case was unusual in one respect. The defendants took the position that the congressional restriction was directed only against discrimination in favor of state banking associations, and they persisted in it to the extent of making no effort at the trial to controvert the evidence produced by the plaintiff to show that a relatively large amount of moneyed capital taxed at a lower rate than the bank's shares, was employed in substantial competition with the business of the bank. When that position proved untenable by reason of settled rulings to the contrary, the case was left where the outcome turned on the evidence of competition produced by the plaintiff. That evidence was somewhat meager, but in the absence of any counter evidence was held sufficient, and the tax was accordingly pronounced invalid. If the outcome was open to criticism, it was not because any enlarged meaning was attributed to the term 'other moneyed capital', but because the facts bearing on the question of competition were not sufficiently brought out at the trial and shown in the record."

In *Montana National Bank v. Yellowstone County, 276 U. S. 499, 72 L. Ed. 673,* the Court held the tax on national banks in Montana invalid because of discrimination in state taxing laws in favor of state banks. It needs neither argument nor comment to prove that a state bank is a competitor of a national bank; and in view of the clear allegations as to the discrimination in favor of the state banks, the court held that the Montana statute did not comply with the condition upon which Congress had granted permission for the taxation by the states of national banks. Here, however, no such case is presented, as state and national banks in Louisiana are taxed under the same statute and in identically the same manner. The wording of the decision in the *Montana* case itself shows that the Court was careful to restrict its ruling in that case to the contrasted taxation of national banks and state corporate banks. Here, again, we see that the factual differences in the cited case and the cases at bar render the decision in the cited case inapplicable to these cases.

In the case of *First National Bank v. Anderson, 269 U. S. 339, 70 L. Ed. 295,* in which there was involved several but not all of the questions presented in these cases, Mr. Justice Van Devanter thus summarized the prior jurisprudence of the Court on the question of the restriction of the right of the states to tax national banking capital:

> "The restriction on the taxation of the shares often has been considered by this court. The earlier decisions have been reviewed from time to time in later cases, and all, taken collectively, may be summarized as showing, **so far as is material here—**
>
> 1. The purpose of the restriction is to render it impossible for any state, in taxing the shares,

to create and foster an unequal and unfriendly competition with national banks, by favoring shareholders in state banks or individuals interested in private banking or engaged in operations and investment normally common to the business of banking. Mercantile Nat. Bank v. New York, 121 U. S. 138, 155, 30 L. Ed. 895, 901, 7 Sup. Ct. Rep. 826; Des Moines Nat. Bank v. Fairweather, supra, 116 (68 L. Ed. 190, 44 Sup. Ct. Rep. 23).

2. The term 'other moneyed capital' in the restriction is not intended to include all moneyed capital not invested in national bank shares, **but only that which is employed in such way as to bring it into substantial competition with the business of national banks.** Mercantile Nat. Bank v. New York, supra, 157 (30 L. ed. 902, 7 Sup. Ct. Rep. 826); First National Bank v. Chehalis County, 166 U. S. 440, 461, 41 L. Ed. 1069, 1078, 17 Sup. Ct. Rep. 629.

3. Moneyed capital is brought into such competition where it is invested in shares of state banks or in private banking; and also where it is employed, **substantially as in the loan and investment features of banking,** in making investments, by way of loans, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment. Mercantile Nat. Bank v. New York, supra, 155-157 (30 L. ed. 901, 902, 7 Sup. Ct. Rep. 826); Palmer v. McMahon, 133 U. S. 660, 667, 668, 33 L. ed. 772, 775, 776, 10 Sup. Ct. Rep. 324; Talbott v. Silver Bow County, 139 U. S. 438, 447, 35 L. ed. 210, 213, 11 Sup. Ct. Rep. 594.

4. The restriction is not intended to exact mathematical equality in the taxing of national bank shares and such other moneyed capital, nor to do more than require such practical equality as is reasonably attainable in view of the differing situations of such properties. But every **clear** discrimination against national bank shares and in favor of a

> relatively material part of other moneyed capital **employed in substantial competition with national banks** is a violation of both the letter and spirit of the restriction. New York v. Weaver, 100 U. S. 539, 25 L. ed. 705; Boyer v. Boyer, 113 U. S. 689, 701, 28 L. ed. 1089, 1092, 5 Sup. Ct. Rep. 706; First Nat. Bank v. Chapman, 173 U. S. 205, 216, 43 L. ed. 669, 673, 19 Sup. Ct. Rep. 407";

to which the learned justice would doubtless have added, if it had been material or pertinent in the case, that the exemption either partial or entire of some capital, such as that invested in building associations and other mutual undertakings, does not, where the exemption is based on a rational public policy of the state, constitute a discrimination, which Congress intended to forbid.

Mercantile National Bank v. New York, 121 U. S. 138, 40 L. Ed. 895.

The learned counsel for the plaintiffs have in their brief quoted at length from the decision in the *Anderson* case and relied upon it as an authority supporting the plaintiffs' contentions; but we respectfully submit that when the case is read carefully in the light of the allegations of the petition which it considered and a demurrer to which it overruled, it will be found that it discredits rather than supports the position of plaintiffs and is a strong authority for the defendants. We have previously quoted from this decision that part which discusses the prior decision of the Court in the case of *Merchants' National Bank v. Richmond, 267 U. S. 635, 65 L. Ed. 1135,* and, like counsel for plaintiffs, have likewise quoted the Court's summary of prior decisions in so far as material to the decision of the case which it was considering. We think it likewise worth while to reproduce that portion of

the decision which deals with the effect of the *Act of March 4th, 1923*, amending *Section 5219 of the Revised Statutes:*

> "By the Act of March 4, 1923, chap. 267, 42 Stat. at L. 1499, Fed. Stat. Anno. Supp. 1923, p. 84, passed after the levy of the tax in question, par. 5219 of the Revised Statutes was amended by extending the consent of Congress to any one of three forms of taxation. That of taxing the shares to their owners was retained as one of the three, and the prior restriction was reenacted with added words, here shown in italics, making it read as follows:
>
> > 'In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state *coming into competition with the business of national banks: Provided, That bonds, notes, or other evidence of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.*'
>
> "The defendants say that this re-enactment was intended as a legislative interpretation of the prior restriction and that the proceedings resulting in its adoption so show. * * * In Mercantile Nat. Bank v. New York, *supra*, where the terms and purpose of the restriction were much considered, it was distinctly held that the words 'other moneyed capital' must be taken as impliedly limited to capital employed in substantial competition with the business of national banks. **In later cases that definition was accepted and given effect as if written into the restriction. It, of course, would exclude bonds, notes or other evidences of indebtedness when held merely as personal investments by in-**

dividual citizens not engaged in the banking or investment business, for capital represented by this class of investments is not employed in substantial competition with the business of national banks. Thus in legal contemplation and practical effect the restriction was the same before re-enactment as after. What bearing a different legislative interpretation might have on a tax already levied, as here, need not be considered."

The able counsel for plaintiffs have made much of the memorandum decision of this Court in the case of *Commercial National Bank of Miles City v. Custer County, 245 Pac. 259*, in which it reversed without comment the decision of the Supreme Court of Montana, which court had held the tax on national banks valid under the Montana statute. We submit that the decision is entirely without weight in this case, as the decision of the Montana court was clearly erroneous in respect to the holding that the only character of business that might properly be regarded as competing with that of national banks is banking business done by individuals or corporations under the state laws. Ever since the rendition of the decision in *Mercantile National Bank v. New York, 121 U. S. 138, 30 L. Ed. 895*, it has been the settled law that competing capital, against a discrimination in favor of which Congress intended to guard national banks, need not be invested in the banking business, but might be any other moneyed capital that actually comes into substantial competition with the business of the complaining banks. In its decision, the Montana Supreme Court said:

"The character of discrimination intended to be enjoined must be held to relate only to such business as is properly classed as that of banking.

* * * * * *

> We are of opinion that it was the intent and purpose of Congress to exempt from the operation of the federal act individuals, copartnerships, corporations, and associations whose primary business is not that of banking, or whose business operations or investments may not be considered as normally common to the banking business."
>
> *(264).*

That the application of this doctrine to the facts in the case did not square with the settled jurisprudence of this Court needs no argument, as shown by the decisions from which we have quoted and as recognized by this Court in reversing the decision without opinion.

The same lack of bearing upon the issues in this case will be noted in the recent affirmance by memorandum opinion of the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *Public National Bank of New York v. Keating, et al.*, reported in *42 Federal Reporter, 2nd. Series, 561.*

Even a casual reading of the opinion of the Court of Appeals in the *Keating* case is sufficient to show that its affirmance was bound to follow as a matter of course and that a detailed consideration of it by this Court would have been nothing more than a rehash of the several recent decisions to which we have heretofore referred.

In the *Keating* case the Circuit Court of Appeals said in part:

> "The construction placed, by the highest court of New York, upon its Tax Act in the cases referred to, in effect is that only such money is in competition with national banks as comes into the

market in a business rivalry arising out of the continuous and regular use of capital in employment or operation, having for its primary and characteristic purpose, as distinguished from some incidental operation or detail, the transaction of some branch of business which may be carried on by the national banks."

* * * * * *

"After this construction by the New York court, the Supreme Court of the United States decided First National Bank v. Hartford, 273 U. S., 548; 47 S. Ct. 462; 71 L. Ed. 767, 59 A.L.R. 1, and Minnesota v. First National Bank of St. Paul, 273 U. S., 561; 47 S. Ct. 468; 71 L. Ed. 774. These cases hold substantially that there is such discrimination as to violate section 5219, R. S. (as amended), where moneyed capital, substantial in amount in comparison with the capitalization of national banks, **is employed either in a business or by private investors in the same sort of transaction as those in which the national banks engage and in the same locality where they do business,** and only personal investments which are not in competition are excluded from moneyed capital. Moreover, it was said that the restriction was intended to prevent discriminatory taxation in favor of capital invested by institutions or individuals engaged either in similar business or in particular operations and investments like those of national banks. It was intended that the federal restriction should apply where the competition exists only with respect to particular features of the business of national banks and where moneyed capital is employed substantially as in the loan and investment features of banking, in making investments by way of loan, discount, or otherwise, in notes, bonds, or other securities, with a view to sale or repayment. It was held not to be directed merely at discriminatory taxation which favors competing banking busi-

> ness. And the competition intended arises not from the character of the business of those who compete, but from the manner of employment of capital by them. Thus it was said that competition guarded against may arise from the employment of capital invested in a business or the employment of capital invested by institutions or individuals in particular operations or investments like those of national banks, including investments of individuals out of surplus funds used in investment and reinvestment in bonds, mortgages, and other evidences of indebtedness. **These cases hold that competition is sufficiently established where it is made to appear that national banks and competing investors are both seeking and securing, in the same locality, capital investments of the same class;** and the court, in construing section 5219 did not imply that equality of taxation under the federal statute refers only to moneyed capital invested in business substantially identical with the business carried on by national banks."

In view of the finding of fact in the *Keating* case as to the employment of billions of dollars by thousands of brokers, bond dealers, private bankers and other individuals in competition with the business of the plaintiff and other national banks in New York, which capital was favored as against that employed in national banks under the state taxing statutes, the conclusion was inevitable that *Section 5219* was violated and affirmance of the judgment in the *Keating* case by this Court is without importance here for the reason that the differences of fact are so great.

In the present case when the absence of evidence showing any actual competition between the national banks which have brought this suit and the various persons and

corporations in whose favor they assert tax discrimination is kept in mind, practically all of the decisions that have been cited by the learned counsel for plaintiffs become, in fact, irresistible arguments against the validity of their own contentions; for, in no one of these cases that we have been able to find has this Court considered as material or relevant evidence showing tax favortism to forms of capital investments other than shares of national banks, which are, however, not directly and substantially in competition with such banks.

Our discussion thus far has covered every form of invested capital which the plaintiffs claim is favored to their injury except that of loans made by life insurance companies to their policyholders. The very recent decision in the case of *Baldwin v. Missouri, 281 U. S. 588, 74 L. Ed. 1056*, appears to us to place beyond discussion the want of authority of the state to tax such credits as are owned by nonresident corporations; and the evidence in this case does not disclose that loans are made in Louisiana by any life insurance companies domiciled in the state itself.

This Court has, we submit, no jurisdiction to pass upon the question of the correctness of the assessment of the furniture and fixtures of the plaintiff banks, since the Supreme Court of Louisiana did not determine this question in its opinion and expressly reserved the rights of the petitioners to have it adjudicated in a subsequent proceeding. It thus cannot be said that the litigation between the parties on the merit of this contention has been terminated by the decision of the Supreme Court of Louisiana and that there can therefore be no review of the decision

on that point by this Court. See among the great number of cases holding to this effect:

Winn v. Jackson, 12 Wheat 135, 6 L. Ed. 577;
Pepper v. Dunlap, 5 How. 51, 12 L. Ed. 46;
Moore v. Robbins, 18 Wall 588, 21 L. Ed. 758;
St. Clair County v. Lovingston, 18 Wall. 628; 21 L. Ed. 813;
Parcels v. Johnson, 20 Wall. 653, 22 L. Ed. 410;
McComb v. Knox County, 91 U. S. 1, 23 L. Ed. 185;
Zeller v. Switzer, 91 U. S. 487, 23 L. Ed. 366;
Davis v. Crouch, 19 U. S. 514, 24 L. Ed. 281;
Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. Ed. 73;
Rice v. Sanger, 144 U. S. 197, 36 L. Ed. 403;
Brown v. Marion Nat. Bank, 36 L. Ed. 1106;
Brown v. Baxter, 146 U. S. 619 sub nom.
Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 40 L. Ed. 991;
Cincinnati Street R. Co. v. Snell, 179 U. S. 395; 45 L. Ed. 248;
Haseltine v. Central Nat. Bank, 183 U. S. 130; 46 L. Ed. 117.

In conclusion we submit that:

(a) The petitioners have not properly taken their appeal and it should be dismissed on that ground;

(b) The Supreme Court of Louisiana having decided these cases against petitioners on questions of fact and the findings being supported by substantial evidence, this Court will not undertake to review such findings of fact and will not go behind the opinion of the Supreme Court of Louisiana;

(c) That upon the facts as shown by the evidence and as found by the Supreme Court of Louisiana, peti-

tioners have failed to adequately prove any forbidden discrimination against them under the system of taxation in force in Louisiana;

(d) That petitioners have neither alleged nor shown any systematic and intentional discrimination against them by the authorities charged with the administration of the tax laws of Louisiana;

(e) That practically all of the monied capital in favor of which petitioners allege tax discrimination to exist is either non-competitive in character or properly favored under the reasonable public policy of the state.

We, therefore, respectfully submit that the appeal should be dismissed and that the judgment of the Supreme Court of Louisiana should be affirmed.

Respectfully submitted,

G. L. PORTERIE,
ROBERT J. O'NEAL,
AUBREY M. PYBURN,
H. C. WALKER, JR.,
LEON O'QUIN,
ELIAS GOLDSTEIN.

APPENDIX.

ACT 14 OF THE SESSION OF THE GENERAL ASSEMBLY OF LOUISIANA FOR THE YEAR 1917 AS AMENDED BY ACT 116 OF 1922 AND BY ACT 221 OF 1928.

To provide for the levying of an annual assessment on the shares of stock and real estate of all banks, banking companies, firms, associations, or corporations engaged in the banking business, chartered under the laws of the State of Louisiana, or the United States, doing business in the State of Louisiana; to declare the shares of stock and other property of all such banks, banking companies, firms, associations, or corporations engaged in the banking business subject to taxation for all purposes; to provide the method of making the assessment of such property and collecting the taxes thereon; to provide penalties for the violation of this Act, and to repeal all laws or parts of laws in conflict herewith.

Section 1 (as amended by Act 116 of 1922). That the shares of stock and the real estate of all banks, banking companies, firms, associations or corporations doing a banking business in this State, chartered by the laws of this State or of the United States, be and they are hereby declared subject to taxation for all purposes in the State of Louisiana; provided, however, that shares of stock in Federal Joint Stock Land Banks organized under the farm loan act of 1916 of the United States Congress shall be assessed for the purpose of taxation at ten per cent of their actual value calculated and ascertained by the method provided in this Act.

HOW ASSESSED.

Section 2. Be it further enacted, etc., That no assessment shall hereafter be made against the capital stock, surplus, or undivided profits of any bank, banking company, firm, association, or corporation engaged in the banking business, chartered under the laws of this State, or the United States, doing business in this State, whose capital stock is represented by shares, but the shares shall be assessed at actual value or the same percentage of actual value as that fixed on other property for State and local assessment purposes, to the shareholders at the domicile or location of the bank, banking company, firm, association, or corporation, who appear as such upon the books, regardless of the domicile of the shareholder and regardless of any transfer not registered or entered upon its books. It shall be the duty of the president, vice-president, cashier, or assistant cashier of any such bank, banking company, firm, association, or corporation engaged in the banking business to furnish to the assessor, on or before Sept. 1st, 1917, and on or before the 20th day of January of each and every year thereafter a complete list sworn to of those who are carried on its books as shareholders. All taxes so assessed against the shares of stock shall be paid by the bank, banking company, firm, association, or corporation engaged in the banking business direct, and it shall be entitled to collect the amount thus paid from the shareholders or their transferees.

WHEN BRANCH BANK'S ASSESSMENT TO BE DIVIDED.

Section 3. Be it further enacted, etc., That when any bank, banking company, firm, association, or corporation is engaged in the banking business, and shall operate a branch bank or banks, banking office or banking offices in any Parish or Parishes other than the Parish of its legal domicile, its assessment shall be divided for State and local purposes, and the number of shares, or fractions thereof, to be assessed in each Parish in which such bank and its branches are maintained shall be determined by the proportion which the capital stock assigned to each bank and branch of such bank shall bear to the whole capital stock; provided that in the event, for any reason, it should be held by the courts that this section is invalid and unenforceable, then, and in such event, the invalidity of this section shall not affect enforcement of the remainder of this Act, and all such banks shall then be assessed at the location or domicile of the main bank in the same manner as banks without branches for current and back taxes.

HOW SHARES ASSESSED.

Section 4 (as amended by Act 221 of 1928). That the basis for arriving at the value of the said shares of stock in any bank, banking company, firm, association, or corporation engaged in the banking business shall be the value of said stock as shown by the statements of said bank, banking company, firm, association, or corporation, made to the Comptroller of the Currency and required to be published, in the case of banks, banking companies, firms, associations, or corporations, created under the laws of the United States, and the statement made to the State

Bank Commissioner, and required to be published, in the case of banks, banking companies, firms, associations, or corporations, created under the laws of the State of Louisiana, less the value, as shown on said statements, of the real estate owned by said bank, banking company, firm, association, or corporation, and less the value, as included in said statements, of the capital stock and obligations of any corporations, all the capital stock of which (except directors' qualifying shares, if any) is owned by said bank, banking company, firm, association, or corporation, and all, or substantially all, the assets of which consist of real estate acquired for debt and/or the building or buildings in which are located the main and/or branch banking house or houses of said bank, banking company, firm, association, or corporation, and/or the land on which the same is situated and/or the furniture and fixtures located thereon and owned in connection therewith. All banks, banking companies, firms, associations, or corporations, engaged in the banking business, State or National, are hereby required to make and furnish, on or before Jan. 20 of each and every year, to the local assessor and to the Louisiana Tax Commission, a duly authenticated statement similar to those made by them as above set out to the Comptroller of the Currency or to the State Bank Commissioner, showing their conditions at the close of business on the 31st day of December of the previous year.

REAL ESTATE IS ASSESSED TO BANK.

Section 5 (as amended by Act 221 of 1928). That the banking house and all real estate owned by any bank, banking company, firm, association, or corporation, shall

be assessed directly to it at actual value, or whatever percentage thereof is determined upon by the Louisiana Tax Commission for State assessment purposes, and the local taxing authorities for local purposes, without regard to the value of said property as shown on the statements of such bank, banking company, firm, association, or corporation, but which shall be equal and uniform with all other property of the same class.

Section 6. Be it further enacted, etc., That the real estate of any bank, banking company, firm, association, or corporation shall be assessed in the parish where it is located and the taxes paid in said parish.

HOW TAXES ASSESSED.

Section 7. Be it further enacted, etc., That the taxes on the shares of stock and real estate owned by any bank, banking company, firm, association, or corporation engaged in the banking business shall be collected in the same manner as the taxes on other property of a like nature are collected. In the event that any bank, banking company, firm, association, or corporation, doing business in this State, chartered under the laws of the United States, or the State of Louisiana, is, by decision of the courts, held not to be liable to pay the taxes on the shares of the shareholders, then the taxes shall be collected from and paid by such shareholders, and each shareholder failing to pay the same may be proceeded against by a rule to produce and by all the other proceedings provided for the collection of taxes on movable property.

PENALTY.

Section 8. Be it further enacted, etc., That any president, vice-president, cashier, or assistant cashier of any bank, banking company, firm, association or corporation engaged in the banking business who shall fail or refuse to comply with any of the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum not less than Fifty ($50.00) nor more than Five Hundred ($500.00) Dollars, or imprisoned for a period of not less than thirty (30) days nor more than one (1) year.

REPEALING CLAUSE.

Section 9. Be it further enacted, etc., That all laws and parts of laws in conflict herewith or contrary hereto, be and the same are hereby repealed.